

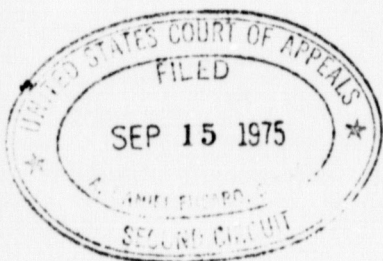
***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-1534

In The
United States Court of Appeals
For The Second Circuit



MORTON I. BAUM,

Plaintiff-Appellant,

VS.

UNITED STATES OF AMERICA,

Defendant-Appellee.

APPENDIX FOR PLAINTIFF-APPELLANT

BAUM & GERSTEN
Attorneys for Plaintiff-Appellant
15 Hamilton Avenue
Monticello, New York 12701
(914) 794-5641

(8671)

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DOCKET ENTRIES
CIVIL DOCKET

JUDGE GAGLIARDI

1a

UNITED STATES DISTRICT COURT

Jury demand date:

72 CIV. 3932

TITLE OF CASE

ATTORNEYS

MORTON I. BAUM

U.S.A.

For plaintiff:

BAUM & GERSTEN, ESQS

15 HAMILTON AVE

MONTICELLO, N.Y. 12701

Tel: 914-794-5641

6/6/71

For defendant:

FABRICANT, LIPMAN, BOYLE, KENNEDY

1 HARRIMAN SQ.

DOSHEN, N.Y. 10924

(ATTY FOR CRANK & SIBIRTZEFF.)

STATISTICAL RECORD

COSTS

DATE

NAME OR
RECEIPT NO.

REC.

DIS.

Clerk

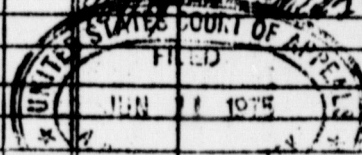
Marshal

Docket fee

Witness fees

Depositions

Action arose at:



ONLY COPY AVAILABLE

IS BAUM vs U.S.A.

PROCEEDINGS

72 Civ. 392

- Filed complaint & issued summons.
 Filed summons with marshals ret, Served U.S.A. by U.S. ATTY on 9/21/72
 Filed stip & order that the time for the deft to answer any motion with respect
 to the complaint is extended to 1/19/73. So Ordered Gagliardi J.
 Filed stip & order that the time of the deft. to answer any motion with respect
 to the complaint is extended to 3/5/73. So Ordered Gagliardi J.
 Filed Mid-Hudson Painting & Decorating Co's Notice of Motion, Ret Leave to
 Intervene. Ret before Gagliardi J.
 Filed CBYT's Affidvt in support of the pending motion for leave
 for Mid-Hudson Painting and Decorating Co. to intervene.
 Filed Intervene's supplemental affidavit by Lawrence X. Kennedy.
 Filed defts & cross-claimants Crank & Sibirtseff, ANSWER to the complaint.
 Filed defts. notice of Motion, Re; Dismiss complaint, tret before Gagliardi J.
 1/27/73
 Filed defts memo of law.
 Filed Pltffs affidavit in opposition to motion to Intervene by Morton I. Baum
 Filed pltffs memo of law.
 Filed memo endorsed on motion papers dtd. 2/20/73. Motion granted, So Ordered
 Gagliardi J. m/h
 Filed Pltffs affidavit in opposition to motion to dismiss.
 Filed reply affidavit of W.R. Bronner in support of motion to dismiss
 complaint.
 Filed stip & order that deft's motion to dismiss complaint ret. on
 3-27-73 adj. to 4-10-73. So ordered. Gagliardi J.
 Filed reply memorandum by U.S. Attorney to pltff's memorandum in
 opposition to Government's motion to dismiss the complaint.
 Filed Pltff's Stipulation of Facts for purposes of motion to dismiss and for sum-
 mary judgment and for cross-motion for summary judgment /
 Filed OPINION # 40544...Accordingly, the deft's motion for summary
 judgment is granted. Gagliardi, J. mn
 Filed JUDGMENT that the deft USA have summary judgment against
 the pltff Norton I. Baum dismissing the complaint. Gagliardi J.
 Filed pltff's notice of motion rel reargue. ret: 4/23/74.
 Filed Notice of appeal by pltff from order granting summary judgment dtd
 4/2/74. Mailed copies.
 Filed Govt's affidavit re: opposition to the motion of pltff insofar as that motion
 seeks reconsideration of the granting of summary judgment, etc.
 Filed OPINION # 4092 Pltff's motion for reargument pursuant to Rule 59 FRCP is
 granted. Dft's motion for summary judgment dismissing pltff's complaint is
 so Ordered. Gagliardi, J(mn)
 Filed Pltff's Notice of Appeal from order of Gagliardi, J. of 5/29/73 granting deft's
 motion for summary judgment dismissing pltff's complaint and failed to grant
 summary judgment to pltff. (mailed copy to U.S. Atty, Paul Curran, 1 St. Andrews
 Place, NY, 8/9/73)

TRUE COPY

RAYMOND E. BURCHAMPT, Clerk

R. G. Gagliardi
 Deputy Clerk

B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
MORTON I. BAUM,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION NO.:

COMPLAINT

-----X

1. Plaintiff is a citizen of the United States of America, residing at R.D. #1, Box 264, Monticello, Sullivan County, New York; this action is to recover surplus moneys arising after sale of seized property in accordance with the provisions of SEC. 6335 of the Internal Revenue Code of 1954, as amended, and jurisdiction is conferred upon this Court under the provisions of SEC. 7426 (a) (2) of the Internal Revenue Code of 1954, as amended.

2. The surplus moneys referred to herein were created by virtue of a sale of real property owned by J. W. Construction Corp., R.D. #2, Route 6, Port Jervis, Orange County, New York, by the United States Treasury Department Internal Revenue Service for unpaid taxes, pursuant to the provisions of SEC. 6335 of the Internal Revenue Code of 1954, as amended, which section regulates the sale of seized property.

3. The sale of seized property was conducted via sealed bid sale on March 17, 1972, and upon information and belief, the real property was purchased by a party by the name of Wilkins at a price of \$31,000.00, which sale was thereafter completed by delivery of a deed to the said Wilkins.

4. Prior to the aforesaid sealed bid sale, on July 26, 1971, a judgment was entered against J. W. Construction Corp. and Jack Waschitz in favor of Mid-Hudson Painting and Decorating Co. in the sum of \$7,852.38, in the Supreme Court of the State of

New York for the County of Orange.

5. By virtue of an execution dated August 30, 1971, delivered to the Sheriff of Orange County, State of New York, the interests of J. W. Construction Corp. and Jack Waschitz, in the same premises sold under the aforesaid sealed bid sale, was sold at public auction by the Orange County Sheriff on March 7, 1972.

6. At the aforesaid public auction held by the Orange County Sheriff on March 7, 1972, plaintiff duly bid, his bid was duly accepted, and the Sheriff of Orange County thereafter duly delivered a Sheriff's Deed dated May 18, 1972, under which deed the plaintiff became the owner of all the estate, right, title and interest which on the 26th day of July, 1971, or any time thereafter, J. W. Construction Corp. and Jack Waschitz had in said premises. A copy of this deed is attached for all purposes.

7. By virtue of the proper docketing of the Mid-Hudson Painting and Decorating Co. judgment, issuance of execution, the provisions of SEC. 6323 of the Internal Revenue Code of 1954, as amended, all Federal tax liens, notice of which were filed with the Orange County Clerk subsequent to the entry of the Mid-Hudson Painting and Decorating Co. judgment, are subordinate to the interests of the plaintiff as the owner of the equity of redemption and such liens were properly extinguished by virtue of the execution and public auction sale.

8. Representatives of the Internal Revenue Service attended the said public auction conducted by the Orange County Sheriff on March 7, 1972.

9. Plaintiff is entitled to all surplus moneys remaining after satisfaction of a Federal tax lien for unpaid taxes stated in a notice of levy dated March 7, 1972 identified as Tax Form No.

941, period ended 9/30/70, date of assessment 12/11/70, identifying number 14-1468058, unpaid balance of assessment \$3,721.79, statutory additions \$181.84 FTP, \$373.48 interest, a total of \$4,277.11. The notice of this lien was filed in the Orange County Clerk's Office on June 3, 1971, file number 4049, collector's serial number 14691.

10. This action has been commenced within the time limitation set forth in SEC. 6532 (c) (1) of the Internal Revenue Code of 1954, as amended.

11. By letter of May 25, 1972, containing an appropriate affidavit, addressed to Donald Hartley, District Director of Internal Revenue Service, Post Office Box 469, Albany, New York, attention, Special Procedures Section, which letter was properly received, demand was duly made that surplus moneys be immediately turned over to the plaintiff, but such demand has been refused.

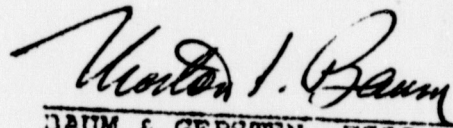
12. Plaintiff has contacted numerous representatives of the Internal Revenue Service in order to determine the exact amount of surplus monies available, but none of the representatives of the Internal Revenue Service have indicated a willingness to grant such information and have generally been secretive about the entire procedure being followed, except that a representative of the Internal Revenue Service did indicate that the entire matter had been forwarded to the Regional Counsel in the City of New York, State of New York, for processing.

13. The said application for surplus proceeds was made under the provisions of SEC. 6342 (b) of the Internal Revenue Code of 1954, as amended.

WHEREFORE, plaintiff demands judgment against the United States of America in an amount equal to all or any part of the amount of surplus proceeds of the Sealed Bid Sale conducted on March 17, 1972, together with interest at the rate of six (6%) per

cent per annum computed from the date of plaintiff's application
for surplus monies, and costs.

Dated: August 30, 1972



BAUM & GERSTEN, ESQS.,
Attorneys for Plaintiff,
by Morton I. Baum, partner
Office & P. O. Address
15 Hamilton Avenue
Monticello, New York 12701
914 794-5641

SHERIFF'S DEED ANNEXED TO FOREGOING COMPLAINT

7a

SHERIFF'S DEED

THIS INDENTURE, made the 18th day of May, 1972, ^{LIBER 1907 AC 784}

between WILBUR K. SHERWOOD, as Sheriff of the County of Orange, in the State of New York, having his principal office at No. 40 Erie Street, in the Village of Goshen, Orange County, New York, party of the first part, and MORTON I. BAUM, 15 Hamilton Avenue, Village of Monticello, Sullivan County, New York, party of the second part;.

WHEREAS, a certain execution was issued out of the County Court, Orange County, on the 30th day of August, 1971, on a judgment entered in the County Court, Orange County, in an action between Mid-Hudson Painting & Decorating Co., Plaintiff, and J. W. Construction Corp., and Jack Waschitz, Defendants, on the 26th day of July, 1971, in favor of the Mid-Hudson Painting & Decorating Co., Judgment Creditor, and against J. W. Construction Corp., and Jack Waschitz, Judgment Debtors, for the sum of \$7,858.38, as appears by the judgment roll filed in the office of the Clerk of the County of Orange, which said judgment was docketed in said Clerk's office on the 26th day of July, 1971; and

WHEREAS, said execution was directed and delivered to the Sheriff of Orange County commanding him to satisfy said judgment out of the real property, among other property of the Judgment Debtors, J. W. Construction Corp., and Jack Waschitz; and

WHEREAS, under the terms of the execution, the interest of the said Judgment Debtors, J. W. Construction Corp., and Jack Waschitz, in the premises hereinafter conveyed and described, was subject to the lien of said judgment when the execution was so delivered; and

the command of said execution, duly sold at public auction on the 7th day of March, 1972, all the estate, right, title and interest which on the 26th day of July, 1971, or any time thereafter, the said Judgment Debtors, J. W. Construction Corp., and Jack Waschitz, had of, in, and to said premises, having held the sale at the County Court House, Main Street, in the Village of Goshen, in said County of Orange, and having first given public notice of the time and place of such sale by advertising, serving, and posting the same according to law, at which sale the said premises were struck off to Morton I. Baum, party of the second part, for the sum of Five Dollars (\$5.00), being the next highest bidder after the highest bidder withdrew his bid, and that being the highest sum so bidden for the same.

WHEREUPON, the Sheriff of Orange County, after receiving from the said purchaser the said sum of money so bidden as aforesaid, gave to the said Morton I. Baum the proofs of publication, service, and posting of the notice of said sale as directed by the law be given.

NOW THIS INDENTURE WITNESSETH, that the said party of the first part, by virtue of the said execution, and in pursuance of the act in such case made and provided, and in consideration of the sum of money so bidden as aforesaid, to him duly paid, has sold and by these presents does grant and convey unto the said party of the second part, his successors and assigns forever, all the estate, right, title and interest which the said Defendants, J. W. Construction Corp., and Jack Waschitz, had on the 26th day of July, 1971, or any time afterward, of, in, and to:

ALL THAT CERTAIN TRACT OR PARCEL OF LAND located in the Town of Greenville, County of Orange and State of New York, being more particularly described as follows:

BEGINNING at the intersection of the center line of New York State Highway Route 6 and the center line of Monahan Road, and running thence southwesterly along the center line of Monahan Road a distance of 519 feet to a corner; thence along lands of Jennings as marked by a stone wall South 38 degrees and 14 minutes East a distance of 338.4 feet to a standing stone; thence along lands of Weinstock as marked by a wire fence and stone wall North 48 degrees and 17 minutes East a distance of 486.9 feet to a standing stone; thence still along lands of Weinstock as marked by a stone wall South 38 degrees and 06 minutes East a distance of 195 feet to a standing stone; thence still along lands of Weinstock as partly marked by a stone wall North 44 degrees and 20 minutes East a distance of 453.7 feet to an 8 inch pin oak; thence still along lands of Weinstock North 56 degrees and 15 minutes West a distance of 463.2 feet to a corner in the center of New York State Highway Route 6 aforesaid; thence southwesterly along the same a distance of 368 feet to the place of beginning.

Containing 7.4 acres, with the foregoing description being in accordance with a survey made by F. X. Conrad, P.E., July 22, 1968.

SUBJECT, however, to the rights of the public in and to such portions of the public highways as are included within the foregoing description.

BEING the same premises as the First Parcel described in deed from James E. Walker and William V. Walker, all of the distributees of Harriet E. Walker to James E. Walker and William V. Walker, dated October 16, 1966 and recorded in the Orange County, N. Y. Clerk's Office in Book 1727 of Deeds at page 955, with the description of said parcel in accordance with the above mentioned survey made by F. X. Conrad.

TO HAVE AND TO HOLD the said above mentioned and conveyed premises unto the said party of the second part, his successors and assigns forever, as fully and absolutely as the said party of the first part, as Sheriff as aforesaid, can or ought to sell and convey the same by virtue of the said execution and the law relating thereto.

IN WITNESS WHEREOF, the said Wilbur K. Sherwood, Sheriff of the County of Orange, in the State of New York, has fully executed this deed the day and year first above written.

Wilbur K. Sherwood
 Wilbur K. Sherwood
 Sheriff of Orange County

STATE OF NEW YORK)
) SS.:
 COUNTY OF ORANGE)

On the 18th day of May, 1972, before me personally, came WILBUR K. SHERWOOD, to me known and known to me to be the Sheriff of Orange County, and to me known to be the individual described in and who executed the above conveyance, and he acknowledged to me that he executed the same, as such Sheriff.

Francis J. Foley
 Notary Public

FRANCIS J. FOLEY
 NOTARY PUBLIC, STATE OF NEW YORK
 APPOINTED IN ORANGE COUNTY
 MY COMMISSION EXPIRES MAR. 30, 1974

11a

SHERIFF'S DEED

WILBUR K. SHERWOOD
Sheriff of the County of Orange

to

MORTON I. BAUM

ORANGE
COUNTY
0 2 8 8 9 0
REAL ESTATE
TRANSFER TAX
Dept. of
Taxation MAY 26 1972
P.B. 10951
STATE OF
NEW YORK
= 00.00
700

Dated: May 1972

Orange County Clerk's Office, N.Y.

Recorded on the 26th day
May 1972 at 4:05
P.M. in Liber 1907
of Book 784
Deeds at page 784
and Examined.

C. N. Winters

BAUM & GERSTEN, ESQS.
15 HAMILTON AVE.
MONTICELLO, N. Y. 12701

~~DEED OF CONFESSION~~
~~IN FAVOR OF~~
~~THE COUNTY OF ORANGE~~
~~NEW YORK~~

77

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

72 CIV. 3932

CIVIL ACTION FILE NO. _____

HORTON I. BAUM,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon Baum and Gersten, Esqs.,

plaintiff's attorney, whose address is 15 Hamilton Avenue, Monticello, New York, 12701, Telephone No. 914-794-5641,

Deputy United States Marshal

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JOHN LIVINGSTON

John Livingston, Clerk of Court.

Jeremiah A. Murphy, Clerk.

Date: SEP 14 1972

(Seal of Court)

Note: This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

102 of

10

CLERK OF COURTS OF N.Y.

STIPULATION AND ORDER (Filed November 15, 1972)
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

13a

W:pt
72-3193

Morton I. Baum

Plaintiff

- against -

United States of America

Defendant

STIPULATION

72 CIV 3932 LPG

IT IS HEREBY STIPULATED AND AGREED by and between
the attorneys for the respective parties, that the time of
the defendant within which to answer or make any motion with
respect to the complaint herein is hereby extended
from November 20, 1972, to and including
the 19th day of January 19 72,

DATED: NEW YORK, N.Y.
November 8, 1972.

Morton I. Baum for
Baum & Bersten
Attorney for Plaintiff

Whitney North Seymour Jr.
United States Attorney
Southern District of New York
Attorney for Defendant

SO ORDERED:

U.S.D.J.

TO: Baum & Bersten, L.L.C.,
15 Hamilton Ave.
Monticello, New York 12701

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Morton I. Baum

Plaintiff

- against -

United States of America

Defendant

STIPULATION

72 CIV 3932 LPO

IT IS HEREBY STIPULATED AND AGREED by and between
the attorneys for the respective parties, that the time of
the defendant within which to answer or make any motion with
respect to the complaint herein is hereby extended
from January 19, 1973, to and including
the 5th day of March 19 73.

DATED: NEW YORK, N.Y.
January 15, 1973

Morton I. Baum for
Baum & Gerstein
Attorney for Plaintiff

William North Simpson
United States Attorney
Southern District of New York
Attorney for Defendant

SO ORDERED:

15/
U.S.D.J.

TO: Baum & Gerstein, Esqs.,
15 Hamilton Ave.
Monticello, NY 12701

NOTICE OF MOTION (Filed February 20, 1973)
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

15a

----- x
MORTON I. BAUM,

Plaintiff,

: Civil Action No. 72-3932

- against -

UNITED STATES OF AMERICA,

: NOTICE OF MOTION

Defendant.

:

----- x

PLEASE TAKE NOTICE, that on the annexed affidavit of Robert Crank and John Sibirtzeff, sworn to on the 15th day of February, 1973, a motion will be made at a term of the United States District Court for the Southern District of New York at the United States Courthouse, Foley Square, Manhattan, New York, 10007, to be held on the 27th day of February, 1973, at 4:00 o'clock in the afternoon of that day, or as soon thereafter as directed by the court as counsel can be heard, before the Hon. Lee P. Gagliardi, for an order granting the Mid-Hudson Painting & Decorating Co. leave to intervene in an action entitled "Morton I. Baum against United States of America", 72 Civ. 3932, assigned to Judge Gagliardi.

PLEASE TAKE FURTHER NOTICE that answering affidavits are required to be served on the undersigned not later than five (5) days before the 27th day of February, 1973, the date for the argument of said motion.

DATED: February 15th, 1973.

Yours, etc.,

FABRICANT, LIPMAN, BOYLE & KENNEDY
Attorneys at Law
One Harriman Square
Goshen, New York 10924
(914) 294-7944

TO:

WILLIAM R. BRONNER, ESQ.
Assistant United States Attorney

BAUM AND GERSTEN, ESQS.
Attorneys for Plaintiff

AFFIDAVIT OR ROBERT CRANK AND JOHN SIBIRTZEFF (Filed February 26, 1973) 16a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
MORTON L. BAUM,

Plaintiff,

: Civil Action No. 72-3932

- against -

UNITED STATES OF AMERICA,

: MOTION TO INTERVENE
: IN ACTION

Defendant.
-----x

STATE OF NEW YORK)

) ss.:

COUNTY OF ORANGE)

ROBERT CRANK and JOHN SIBIRTZEFF, being duly sworn,
depose and say:

1. That we are citizens of the United States of America and partners in the Mid-Hudson Painting & Decorating Co., with offices at 141 Linden Avenue, Middletown, New York, and make this motion for leave to intervene in the captioned action to recover surplus monies arising after the sale of seized property in accordance with the provisions of §6335 of the Internal Revenue Code of 1954, as amended, and jurisdiction is conferred upon this Court under the provisions of §7426 (a) (2) of the Internal Revenue Code of 1954, as amended.

2. That on July 26, 1971, your deponents, as Mid-Hudson Painting & Decorating Co., obtained and entered a judgment in the Supreme Court of the State of New York against J. W. Construction Corp. and Jack Waschitz in the sum of \$7,858.38, said judgment being obtained upon the failure of payment by J. W. Construction Corp. and Jack Waschitz under a contract of April 7, 1970, entered into by your deponents and J. W. Construction Corp. and Jack Waschitz, copy of said contract in germane part is annexed hereto, made a part hereof and marked as "Exhibit A", together with copies of two notes issued to your deponents providing for payment thereunder.

3. That upon information and belief, subsequent to the entry of your deponents' judgment, the Internal Revenue Service on September 8, 1971, seized certain real property belonging to said J. V. Construction Corp. and Jack Waschitz, said property being more fully set forth on the Sheriff's deed annexed to the complaint in the instant action.

4. That despite numerous and repeated attempts by your deponents to ascertain of the Internal Revenue Service whether or not such real property had indeed been seized, no explanation or verification of same by the Internal Revenue Service was made to your deponents; lacking any verification from the Internal Revenue Service as to its activities, your deponents proceeded to an execution on said property on August 30, 1971, and a sale at public auction by the Orange County Sheriff on March 7, 1972, at which sale the plaintiff in the instant action allegedly purchased the property.

5. That subsequent thereto and on March 17, 1972, by sealed bids sale, the Internal Revenue Service sold the seized property to one Wilkins at a price of \$31,000.00, which sale was completed by delivery of a deed to the said Wilkins.

6. That your deponents repeatedly since February 24, 1972, have inquired of the Internal Revenue Service re a claim for surplus money as overage on any Internal Revenue Service sale; claims for overage were made by your deponents on March 17, 1972, and thereafter, including one by affidavit on May 10, 1972, addressed to the District Director, Internal Revenue Service, P.O. Box 731, Albany, New York, 12201.

7. That, had your deponents been informed in any reasonable manner by the representatives of the Internal Revenue Service of the fact of a seizure by the Internal Revenue Service, said purported Sheriff's sale would never have been undertaken pursuant to the judgment we obtained on July 26, 1971; such was not the case.

3. That the plaintiff in the instant action is seeking to obtain a windfall by claim to overage upon his purported purchase of the subject property for \$5.00 at the Sheriff's sale and has assertion herein of the rights of an owner of the equity of redemption.

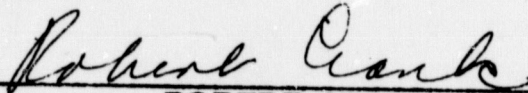
9. That your deponents, with a valid recorded judgment for \$7,858.38, have the first claim to the overage in this action and are entitled to all surplus monies remaining after satisfaction of the Federal Tax lien for unpaid taxes; the Court's attention is respectfully called to paragraph 11 of the complaint which alleges that a letter by the plaintiff in the instant action was mailed to the Director of the Internal Revenue Service on May 25, 1972; this was subsequent to your deponent's affidavit being mailed to such office on May 10, 1972, a copy of which affidavit is annexed hereto, made a part hereof and marked as "Exhibit B"; our May 10, 1972, affidavit was but one of repeated demands, claims and letters made to the Internal Revenue Service in connection with our claim for overage.

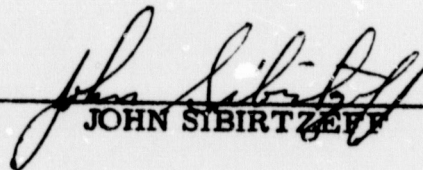
10. That within the plain meaning and intendment of §6342, the application of proceeds of the levy is payable to your deponents as we are the persons legally entitled thereto; the action of the plaintiff is predicated upon our valid judgment being entered on July 26, 1971, and his purported rights flowing therefrom.

11. That, plainly, our claim for overage is a matter of record and has a priority, even accepting the allegations of the plaintiff in the instant action entirely.

12. That your deponents pray the Court for leave to intervene in this action so that their rights under §6342 of the Internal Revenue Service Code arising from the Internal Revenue Service sale of March 17, 1972, will be protected and your deponents paid the amount of their judgment.

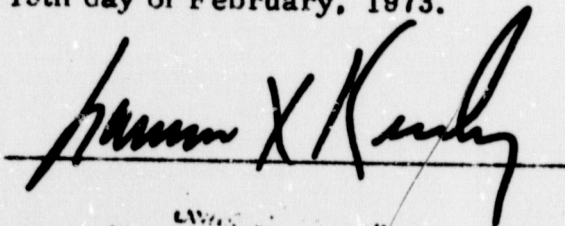
WHEREFORE, your deponents respectfully request the Court's leave to intervene in the captioned action with all of the rights of a party thereto.


ROBERT CRANK


JOHN SIBIRTZEFF

Sworn to before me this

15th day of February, 1973.



NOTARY PUBLIC
STATE OF NEW YORK
COUNTY OF ...
COMMISSION EXPIRES ... 74

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT

EXHIBIT A - AGREEMENT BETWEEN J. W. CONSTRUCTION CORP. AND
MID-HUDSON
J. W. CONSTRUCTION CORP.

20a

JACK WASCHITZ
PRESIDENT

R. D. 2, ROUTE 6
PORT JERVIS, NEW YORK

April 7, 1970

AGREEMENT BETWEEN

J. W. Construction Corp., a New York Corporation, herein known as the Contractor, with an office at R. D. #2, Route 6, Port Jervis, N. Y., and

Mid-Hudson Painting and Decorating Co., a partnership between Robert Crank of Benedict Drive, Warwick, New York and John Sibirtzeff of 141 Linden Avenue, Middletown, New York, herein known as the Sub-Contractor.

The Sub-Contractor agrees to supply all necessary labor, materials, and equipment to perform work according to Plans and Specifications by Paver & Wildfoerster, Architects, 40 Grove Street, Middletown, New York, for the Project known as Medical Office Building, Orange Medical Diagnostic Group, Middletown, New York, under Divisions 9D (Taping only), 9F Painting, and 9G Wall Covering. Plans are designated Sheet A-1 to A-19, SK-1, SK-2 and include Change Order #6.

This work will be done for the sum of (\$20,350.00) Twenty thousand three hundred and fifty dollars, all applicable taxes included in this price.

Signatures below by both parties constitute acceptance of this Agreement consisting of six (6) pages and the parties for themselves, their successors, legal representatives and assigns hereby agree to the conditions hereof.

Accepted
Subcontractor

By Robert Crank
Robert Crank

By John Sibirtzeff
John Sibirtzeff

Accepted
Contractor

By Jack Waschitz
Jack Waschitz President

CONDITIONS

1. PROSECUTION OF WORK

The Subcontractor shall start the Work within five days after notice from the Contractor to proceed, shall prosecute it diligently, and coordinate it with the work of the Contractor and of other subcontractors as directed by the Contractor so that it will not delay their work.

2. LABOR, WORKMANSHIP, AND MATERIALS

The Work shall be done in the best manner, by workmen who are satisfactory to the Contractor, and materials used shall be acceptable to such workmen. If the Contractor is a party to or bound by any union agreement or agreements relating to or affecting workmen employed on the Work, the Subcontractor agrees to comply with and be bound by such union agreement or agreements.

3. REMOVAL OF CONDEMNED WORK

The Work shall proceed under the direction of the Architect and the Contractor. Work, which in the opinion of the Architect or Contractor fails to conform to the Contract Documents, shall be removed and replaced with satisfactory materials and workmanship, and the Subcontractor shall make good any other work damaged thereby. If removal of such work is inexpedient, it may be accepted and the Contractor may deduct from the amount due to the Subcontractor the difference in value between the Work specified and the Work furnished.

4. CUTTING, FITTING AND PATCHING

The Subcontractor shall, within his contract price, do all cutting, fitting and patching of his Work that may be required to make its several parts come together properly, and to fit it to receive or be received by the work of other contractors, shown upon or reasonably implied by the contract documents.

5. CHANGES IN THE WORK

The Contractor may from time to time, without invalidating this Agreement, order such extras, additions, alterations, omissions, or other modification in the Work hereunder as he may deem necessary. Such changes shall be valid only on the written order of the Contractor which shall set forth the additional time, if any, to be allowed for its completion and the amount to be added to or deducted from the Price or the method of its determination. If required by the Contractor, in fixing said amount the Subcontractor shall submit his estimate of the value of such change and of the time required for completion.

6. ABANDONMENT OR TERMINATION OF OWNER-CONTRACTOR CONTRACT

If the Owner shall terminate, cancel, or otherwise repudiate its Contract with the Contractor or abandon, cancel or indefinitely suspend the Work, the Contractor may terminate this Agreement. In such event, the Contractor will reimburse the Subcontractor for damage directly resulting from such action on the part of the Owner; but the Subcontractor shall not be entitled to prospective profits or overhead on work not performed and materials not furnished.

7. CAUSE FOR TERMINATION

If the Subcontractor shall (1) fail to supply a sufficient number of satisfactory workmen, or sufficient satisfactory material, or (2) otherwise fail to prosecute the Work satisfactorily and promptly, or (3) cause stoppage, delay or interference with the work of the Contractor or other subcontractors, or (4) fail to perform any condition hereof, or (5) become insolvent, commit any 'act of bankruptcy', or voluntarily or involuntarily engage in reorganization or arrangement proceeding under the bankruptcy laws, or (6) assign or sublet the Work or any moneys due hereunder without the Contractor's written consent; then the Contractor may upon three (3) days' written notice, terminate and cancel this Agreement. In such event, the Contractor may use the Subcontractor's material and equipment to complete the Work, or may complete the Work in any other expedient manner, and the Subcontractor shall receive no further payments until the Work is complete. Upon completion, if the unpaid balance of the Price exceeds the Contractor's cost of completion, such excess shall be paid to the Subcontractor; but if such cost of completion exceeds the unpaid balance of the Price, the Subcontractor shall pay the difference to the Contractor.

8. REMOVAL OF RUBBISH, EQUIPMENT, ETC.

The Contractor shall be responsible for the general removal of rubbish accumulated on the Work, but the Subcontractor shall gather together and remove from the jobsite all debris and rubbish caused by his work as required.

9. SUBLETTING, TRANSFER, OR ASSIGNMENT

The Subcontractor shall not sublet, assign or transfer this Agreement or any part of the Work without the written consent of the Contractor. If the Subcontractor shall subcontract any part of the Work, it shall submit for the approval of the Contractor the name of the subcontractor who is to perform such Work.

10. LIENS, CLAIMS

The Subcontractor shall remove, within five (5) days, after filing, any liens filed against the premises or public improvement fund by any party or parties performing labor or services or supplying materials in connection with the Work for the Subcontractor, or the Contractor may remove such liens at the Subcontractor's expense.

If any claim arising from the Work should be asserted against the Contractor, Architect, or Owner, the Contractor may take all necessary steps, including retention of payments due to the Subcontractor, to discharge such claim at the Subcontractor's expense.

The Subcontractor waives the right to have, file or maintain mechanics or materialman liens of any kind, nature or description against the premises upon which the work under this Contract is to be performed or any part thereof and hereby irrevocably constitutes the Contractor, its Agent, and Attorney with power to discharge of record any such claims or liens which may be filed, but always at the expense of the Subcontractor.

11. ROYALTIES, LICENSES, AND PATENT INFRINGEMENTS

The Subcontractor shall pay all royalties and license fees and shall defend all claims for infringement of patent rights asserted against the Owner, Contractor, or both, and shall reimburse them for loss on such claims.

12. LAWS, REGULATIONS, LICENSES, AND PERMITS

The Subcontractor shall comply with all laws and regulations pertaining to conduct of the Work and shall obtain any pay for all licenses and permits pertaining to the Work.

13. USE OF HOIST

The subcontractor agrees to pay for use of the Contractor's hoist at the rate of _____ per hour. In the event that the Contractor supplies a bellman in connection with the Subcontractor's use of the hoist, the Subcontractor agrees to pay to the Contractor the amount of the bellman's wages at union rates, and the cost of insurance required by employment of such bellman.

14. METHOD OF PAYMENT

On demand by the Contractor the Subcontractor shall submit a complete detailed statement of the Price subdivided into the various items, to be used only as a basis for calculation of payments due.

On the twenty-fifth day of each month, the Subcontractor shall render to the Contractor, a written requisition for payment in the form required by the Contractor, containing a statement of the value of Work, in relation to the Price, installed in the Project up to that date.

On or before the 25th day of the month, the Contractor, with the approval of the Architect, shall pay to the Subcontractor eighty-five (85) per cent of the value, in relation to the Price, of Work installed in the Project during the preceding period.

The balance of the price shall be paid to the Subcontractor within thirty days after final acceptance of the Project by the Architect and Owner.

15. PAYMENTS NOT ACCEPTANCE OF WORK

Payments hereunder shall not be construed as conclusive evidence of the performance of this Agreement, in part or in whole, nor as acceptance of unsatisfactory Work, nor shall such payments preclude any action for damages by either party based on failure to comply with any of the conditions of this Agreement.

16. GUARANTEE

The Subcontractor guarantees that the Work shall be free from defects and shall meet the requirements of the Contract Documents. The Subcontractor agrees to make good any Work which proves defective within one year (or such longer period as may be specified in the Contract Documents) from the date of acceptance of the Project.

The Subcontractor also agrees to pay for any damage to the Project resulting from defects in the Work and all costs of removal, replacement or repair of other work damaged in complying with this guarantee.

17. ARBITRATION ETC.

If the Contract Documents provide for arbitration, and the Contractor becomes involved in an arbitration with the Owner relating to or involving the Work, materials, rights or responsibilities of the Subcontractor, the Contractor agrees to give the Subcontractor an opportunity to present, and to submit evidence in such arbitration, and the Subcontractor agrees to be bound by the decision on such arbitration. If the Contract Documents provide for final and conclusive decisions by the Architect and/or Owner with respect to the Work, the Subcontractor shall be bound by any such decision with respect to the Work which is binding on the Contractor.

Subject to the provisions of the preceding paragraph, any dispute or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration in accordance with the provisions, then obtaining, of the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator or Arbitrators may be entered in any court having jurisdiction thereof. The decision of the arbitrators shall be a condition precedent to any right of legal action that either party may have against the other.

The Subcontractor shall not cause a delay of the Work during any arbitration proceedings except by written agreement with the Contractor.

Notwithstanding the foregoing provisions relating to arbitration, it is expressly understood and agreed between the Contractor and the Subcontractor that this agreement cannot be modified or reformed by arbitration.

18. WORKMEN'S COMPENSATION, WAGES AND HOURS, SOCIAL SECURITY, OTHER LAWS, AND INDEMNITY

The Subcontractor shall comply with all federal and state laws relating to workmen's compensation, employers' liability, public liability, wages and hours, social security and unemployment insurance, income taxes, and all other laws applicable to the work, and shall cause its subcontractors to comply therewith, and shall give to the Contractor satisfactory evidence of such compliance, prior to and during performance of the Work. The Subcontractor shall reimburse the Contractor for any payments the Contractor may be required to make to or on the account of the Subcontractor's employees, and shall reimburse the Contractor for any loss incurred as a result of the Subcontractor's default on any of the foregoing promises. The Subcontractor shall also reimburse the Contractor for damages or loss arising from the Work because of bodily injuries, including death at any time resulting therefrom, sustained by any person or persons, and because of injury to or destruction of property, due to any act or neglect of the Subcontractor, its employees or agents.

19. GOVERNMENT TAXES

The Subcontractor, for the Contract Price herein provided for, hereby accepts and assumes exclusive liability for, and shall hold the Contractor harmless against the payment of:

- A. All contributions, taxes or premiums which may be payable under Federal, State or Local Laws arising out of the performance of the Work.
- B. All sales, use or other taxes, of whatever nature levied or assessed against the Owner, the Contractor or the Subcontractor arising out of the furnishing or installing by the Subcontractor hereunder of any kind of building materials, supplies or equipment.

20. INSURANCE

The Subcontractor shall provide for himself and maintain at his own expense, until completion of the Work, the following forms of insurance, with limits of liability as specified in Schedule A:

"WORKMEN'S COMPENSATION INSURANCE," including Employers' Liability Insurance, in accordance with the laws of the State in which its employees perform the Work;

"PUBLIC LIABILITY INSURANCE" (Bodily Injury Liability Insurance);

"PROPERTY DAMAGE LIABILITY INSURANCE";

"CONTRACTORS' PROTECTIVE PUBLIC LIABILITY INSURANCE" (Bodily Injury Liability Insurance) for the account of the Subcontractor when it sublets to another any portion of the Work;

"CONTRACTORS' PROTECTIVE PROPERTY DAMAGE INSURANCE," for the account of the Subcontractor when it sublets to another any portion of the Work.

Before commencing the Work, the Subcontractor shall furnish a certificate from his insurance carrier or carriers showing that he has complied with the requirements of this Agreement regarding insurance and providing that the coverage of these policies will not be materially changed or cancelled during their term until five days' written notice has been given the Contractor, and if requested, the Subcontractor agrees to exhibit such policies to the Contractor.

21. FIRE INSURANCE

Except as otherwise provided in the contract between Contractor and Owner, the Contractor shall effect and maintain either through the Owner or by himself, until final payment under the Owner-Contractor contract is made by the Owner to the Contractor, one or more separate policies or a blanket policy for the benefit of the Owner, the Contractor and his Subcontractors and Materialmen, as their interests may appear, covering Fire Insurance and full extended coverage, with builder's risk endorsement, insuring all Work done and all materials, equipment, apparatus, fixtures, supplies and temporary structures incident to the construction described in the principal Contract between the Contractor and the Owner, if the same are not otherwise insured by the Subcontractor, and while the same are located on the site of the Work, or adjacent thereto on sidewalks, streets or alleys. Such insurance shall not apply to plant, equipment, tools or fixtures forming part of the capital assets of the Subcontractor, or belonging to any of his employees, and which are not included in the cost of the Work herein described, nor to usual exclusions in standard policies of insurance. The amount of such insurance shall, at all times be sufficient to cover the cost of repairing, rebuilding or replacing the property lost or damaged by causes to which such insurance is applicable. In the event of such loss or damage, if the Contractor is liable to repair, rebuild or replace such property so lost or damaged, the Subcontractor agrees to be and remain liable for the replacement to its original condition of such portion of the

Subcontractor's Work as may be so lost or damaged, which replacement shall be in accordance with the provisions of this Subcontract and of the aforesaid Owner-Contractor contract, and shall be at the sole cost and expense of the Subcontractor; provided, that the Contractor shall be obligated to pay the Subcontractor on account of the cost of such replacement, such sum or sums as shall be paid to the Contractor by the insurance carrier on account of such loss or damage to the Work performed by, or property owned, controlled or furnished by the Subcontractor and covered by such insurance. The Subcontractor agrees to cooperate to the extent required to establish a proper appraisal of the property lost or destroyed and otherwise to perform the conditions precedent to adjustment of such loss or damage.

22. LIQUIDATED DAMAGES

If there is a provision for liquidated damages in the Contract Documents, the Subcontractor shall be liable to the Contractor for any liquidated damages for which the Contractor is held responsible by reason of the failure of the Subcontractor to prosecute the Work diligently and properly.

23. OBLIGATIONS ASSUMED BY SUBCONTRACTOR

Except as otherwise provided herein, the Subcontractor shall with respect to the Work be bound to the Contractor by the terms of the Contract Documents, and the Subcontractor shall with respect to the Work assume toward the Contractor all the obligations and responsibilities that the Contractor, by the Contract Documents assumes toward the Owner.

24. CLAIMS BY EITHER PARTY AGAINST THE OTHER

If either the Subcontractor or General Contractor believes he has a claim of any nature whatsoever against the other party, he shall give the other written notice of the amount whenever possible, and the details, of such claim within 30 days of notice of the occurrence of the event upon which such claim is based or within such other time limit as may be otherwise expressly set forth in the Contract Documents.

The Subcontractor agrees that he shall have no claim for money damage for delay no matter how caused, but for any delay not due to his fault, he shall be entitled only to such extension of time for the performance of his Work as shall be allowed to the Contractor or by the Contractor.

Any damage, cost, loss or expense, including Counsel fees, suffered or incurred by the Contractor by reason of or in consequence of the Subcontractor's failure to perform this Subcontract shall be fully chargeable to and shall be paid by the Subcontractor.

25. APPLICABLE LAW

All matters relating to the validity, performance, interpretation or construction of this agreement or the breach thereof shall be governed by the law of the State of New York.

26. EFFECT OF ACCEPTANCE

Upon acceptance of this Agreement by signature on page 2, all prior negotiations and communications between the parties, verbal or written, are superseded by and merged in this Agreement and evidence of such negotiations or communications prior to such execution shall be inadmissible to vary the terms hereof. No modification of this Agreement shall be binding unless the same is in writing signed by the Contractor and Subcontractor.

27. EFFECT OF CONDITIONS ON CONTRACT DOCUMENTS

The Conditions are intended to supplement the Contract Documents. If any of the provisions of any of the Conditions change, modify or eliminate, or are inconsistent with, any of the provisions of the Contract Documents, the provisions of the Conditions shall govern.

\$ 4000 ⁰⁰/₁₀₀ July 24, 1970
 (7) seven weeks after date I promise to pay to
 The order of Mid Hudson Painting & Decorating Co
Four thousand ⁰⁰/₁₀₀ 00 Dollars
 Payable at County National Bank, Middletown, N.Y.
 Value received with interest J.W. CONSTRUCTION CO. INC.
 No. _____ Due Sept 11, 1970 Jack Woolrich Pres.
 B & P No. N 775 MADE IN U.S.A.

\$ 6,000 ⁰⁰/₁₀₀ Jan 8 1971
 (1) one month after date I promise to pay to
 The order of Mid-Hudson Painting
Five thousand ⁰⁰/₁₀₀ 00 Dollars
 Payable at Empire National Bank, Middletown, N.Y.
 Value received with interest J.W. CONSTRUCTION CO. INC.
 No. _____ Due Feb 8, 1971 Jack Woolrich Pres.
 B & P No. N 775 MADE IN U.S.A.

EXHIBIT B - AFFIDAVITS

27a

STATE OF NEW YORK

COUNTY COURT : COUNTY OF ORANGE

-----x

MID-HUDSON PAINTING & DECORATING CO., :

Plaintiff, :

-against- :

J. W. CONSTRUCTION CORP., and :
JACK WASCHITZ, :

Defendants. :

-----x

AFFIDAVIT

Index No. 2295-1971

STATE OF NEW YORK)
COUNTY OF ORANGE)SS:

ROBERT CRANK and JOHN SIBIRTZEFF, being duly sworn, depose and say:

1. That, we are partners in the MID-HUDSON PAINTING & DECORATING CO., with offices at 141 Linden Ave., Middletown, New York.

2. That, a party named WILKIN, purchased the real property of J. W. CONSTRUCTION CORP. and JACK WASCHITZ, at an Internal Revenue Service sale, held on March 17, 1972 at the Internal Revenue Service Office, at 41 Dolson Ave., Middletown, New York.

3. That, the instant Affidavit is made at the direction of the Internal Revenue Service Office in Middletown, New York, in support of a claim for overage by your deponents, your deponents having obtained a Judgment against the J. W. Construction Corp. and Jack Waschitz on July 26, 1971, for \$7,858.38, which Judgment precedes all other Judgments against the J. W. Construction Corp. and Jack Waschitz.

4. That, upon information and belief, proceeds of the sale to the party named WILKIN, of the property in question, were forwarded to the Albany office of the Internal Revenue Service,

against which proceeds, your deponents make claim for overage.

5. That, your deponents have been instructed that application for overage may be made by Affidavit and that formal form for same is not required.

WHEREFORE, it is respectfully submitted that, a check corresponding to the amount of your deponent's claim, to wit, \$7,858.38, be issued by the Internal Revenue Service, payable to the order of your deponents.

H Robert Crank
Robert Crank

John Sibirtzeff
John Sibirtzeff

Sworn to before me this

10th day of May, 1972.

H Susan F. Siler

SUSAN F. SILER
Notary Public, State of New York
Qualified in Orange County
Term Expires Mar. 30, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

29a

- - - - - x
MORTON I. BAUM, :
Plaintiff, : AFFIDAVIT
v. : 72 Civ. 3932
UNITED STATES OF AMERICA, :
Defendant. :
- - - - - x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

WILLIAM ROCHE BROWNER, being duly sworn, deposes
and says:

1. I am an Assistant United States Attorney in
the office of Whitney North Seymour, Jr., United States
Attorney for the Southern District of New York, attorney
for defendant, and am assigned the defense of the above
action. As such I am fully familiar with the facts herein.

2. This affidavit is submitted in support of
the pending motion for leave for Mid-Hudson Painting and
Decorating Co. ("Mid-Hudson") to intervene in this action.

3. The facts are essentially as stated in the
affidavit of Robert Crank and John Sibirtzeff, submitted
in support of the present motion.

4. Had Mid-Hudson brought a separate action under 26 U.S.C. §§ 6342(b) and 7426(a)(2), defendant would not have contested jurisdiction. Instead, it would have moved to consolidate it with the present action.

5. The present motion does not explicitly state whether Mid-Hudson seeks to intervene as a plaintiff or as a defendant. Since the interests of plaintiff, defendant, and Mid-Hudson are all mutually adverse, the denomination as plaintiff or defendant should not be significant to the conduct or outcome of the action.

6. Only plaintiff and Mid-Hudson have filed timely administrative claims for the surplus monies, although there are other creditors who could have done so. It therefore appears that, if the present motion is granted, all parties with presently litigable interests will have been joined in one action.

7. Defendant's support of the present action is without prejudice to its interest in the monies claimed by it as well as by plaintiff and Mid-Hudson.

William Roche Bronner
WILLIAM ROCHE BRONNER
Assistant United States Attorney

Sworn to before me this
day of February, 1973.

SUPPLEMENTAL AFFIDAVIT OF LAWRENCE X. KENNEDY (Filed
February 27, 1973)
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

31a

MORTON I. BAUM,

Plaintiff,

- against -

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 72-3032

SUPPLEMENTAL AFFIDAVIT
in Support of Motion to
Intervene in Action

STATE OF NEW YORK)

) ss.:

COUNTY OF ORANGE)

LAWRENCE X. KENNEDY, being duly sworn, deposes and says:

1. That he is a partner in the law firm of Fabricant, Lipman, Boyle & Kennedy and makes this affidavit in support of the motion of Robert Crank and John Sibirtzeff, d/b/a Mid-Hudson Painting & Decorating Co. (the intervenors) for leave to intervene in the captioned action to recover surplus monies arising after the sale of seized property in accordance with the provisions of §6335 of the Internal Revenue Code of 1954 as amended.

2. We have been served only this morning with the plaintiff's Memorandum of Law and Affidavit in Opposition.

3. Since February 24, 1972, and by affidavit since May 10, 1972, the intervenors have had a claim for the amount of their judgment (\$7,858.38) filed with the Internal Revenue Service; the Internal Revenue Service has stated that the proceeds of the I. R. S. sale of March 17, 1972, have been forwarded to the District Director in Albany, and that the Internal Revenue Service itself would make a distribution of the proceeds of the sale once the respective priorities with respect to surplus had been established by I. R. C.; the courts attention is called to the May 10, 1972, affidavit of the intervenors filed with the Internal Revenue Service, which

affidavit, upon information and belief, enjoys a priority of filing over that of the plaintiff by some 15 days (the plaintiff, Baum, does not indicate in Paragraph 11 of the complaint whether it is his, his clients, or an assignment of his client's claim to him that he made his May 15, 1972, claim for overage for); the intervenors have been awaiting the distribution of the surplus proceeds by the Albany office of the Internal Revenue Service since the time of filing of their claim on May 10, 1972. Upon subsequent inquiry from this office on behalf of the intervenors, the intervenors were first advised, in reply, that the matter had been referred to Regional Counsel in New York City (see annexed letter, marked "Exhibit C"); the intervenors have waited and proceeded throughout on the advisement of and belief that the Internal Revenue Service would make an imminent distribution of the surplus proceeds and thereby satisfy the intervenors claim; upon information and belief, only when the plaintiff, Baum, having "purchased the subject property for \$5.00" at a Sheriff's sale (which sale would have been cancelled by the Office of the Sheriff of Orange County and by the judgment creditor intervenors had the full facts of the Internal Revenue Service levy on the subject property on September 9, 1971, been known), ascertained that his or his clients claim for overage was subsequent to the claim of the intervenors, did he commence the instant action; there was no advisement by the plaintiff, Baum, whatsoever of the fact of such commencement of action and it is plain that same was commenced as a means of circumventing his disadvantageous position relative to his claim for overage.

4. The plaintiff, Baum's, position is, necessarily, that the judgment of the intervenors was a valid judgment and that the Sheriff's sale pursuant thereto was likewise valid, and, in such manner, he obtained his purported right as "holder of the equity of redemption"; yet, it is plain that it was the Internal Revenue Service's levy and sale's validity

which rendered the Sheriff's sale a nullity and any rights derived thereunder by plaintiff ludicrous in the assertion. Despite the difficulties in obtaining written communication from the Internal Revenue Service in this matter, the intervenors have patiently awaited the payment of their claim by the Internal Revenue Service.

5. The intervenors have been advised by the United States Attorney's office that the time of the defendant, United States of America, within which to answer the complaint has been set for March 5, 1973; the intervenors would presumably enter this action as parties defendant and cross claimants and will serve their answer by the March 5, 1973, date.

6. The Internal Revenue Service levy upon the subject property was made September 9, 1971, and the action of Mr. Baum was not begun at least until the following September of 1972, more than nine months from the date of the levy as set forth in §6632(c)(1) of the Internal Revenue Code (if the 12 month extension from levy is in effect, intervenors, of course, come under it), and commenced so as to circumvene a distribution of the surplus proceeds by the Internal Revenue Service and the payment to the intervenors of the amount of their lien, \$7,858.38 (certainly the equities are clear relative to the intervenors entitlement to payment of their judgment for the painting services they performed). Such rights as plaintiff has stem from a sale which was a nullity; his rights thereunder are a nullity, and the complaint should be dismissed.

WHEREFORE, it is respectfully requested that the motion of the intervenors to intervene in the captioned matter with all of the rights of a party thereto should be granted, the complaint dismissed, and the intervenors have judgment on their cross claim against the United States of America for \$7,858.38 with interest from March 17, 1972.

Respectfully submitted,

Sworn to before me this 26th
Day of February, 1973.

Constance C. Cauland
CONSTANCE C. CAULAND
NOTARY PUBLIC STATE OF NEW YORK
QUALIFIED IN ORANGE COUNTY

Lawrence X. Kennedy
Lawrence X. Kennedy

EXHIBIT C - LETTER FROM LIONEL G. FAVREAU ANNEXED TO FOREGOING.
AFFIDAVIT

34
U.S. DEPT. OF THE TREASURY, N.Y. 12201

Department of the Treasury

P. O. Box 731, Albany, New York 12201

Assistant Director

December 6, 1972

C&TSD

Lawrence X. Kennedy, Attorney at Law
1 Harrison Square
P. O. Box 60
Goshen, New York 10924

RE: Mid-Hudson Painting & Decorating Co.
vs. J. W. Construction Corp. and
Jack Waschitz

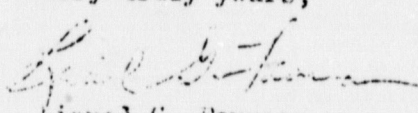
Dear Sir:

Your letter dated November 30, 1972 has been directed to me for a reply.

Please be advised that the entire matter with regard to the above-captioned action has been referred to our Regional Counsel in New York City.

There are several claims for surplus monies involved in this case and it appears that priorities have to be established before a determination can be made regarding the distribution of any surplus funds.

Very truly yours,


Lionel G. Favreau
Chief, Special Procedures Staff

LMV/ed

ANSWER AND CROSS CLAIM (Filed February 28, 1973)
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MORTON I. BAUM,

Plaintiff,

- against -

UNITED STATES OF AMERICA,

Defendant.

: Civil Action No. 72-3932

: ANSWER and
: CROSS-CLAIM

FILED
U.S. DISTRICT COURT
S.D.N.Y.
FEB 28 9 37 AM '73

Defendants and Cross Claimants, Robert Crank and John Sibirtzeff, d/b/a Mid-Hudson Painting & Decorating Co. (Mid-Hudson), by their attorneys FABRICANT, LIPMAN, BOYLE & KENNEDY, answering the complaint of the plaintiff herein, respectfully show and allege to this Court the following:

1. Defendants admit the allegations of the complaint contained in paragraphs 2, 3, 4, 5 and 8.
2. Defendants deny knowledge and information sufficient to form a belief as to the allegations of the complaint contained in paragraphs 1, 11, 12 and 13.
3. Defendants deny the allegations of the complaint contained in paragraphs numbered 6, 7, 9 and 10.

AS AND FOR THEIR CROSS CLAIM AGAINST DEFENDANT,
UNITED STATES OF AMERICA:

Defendants and Cross Claimants, Robert Crank and John Sibirtzeff, d/b/a Mid-Hudson Painting & Decorating Co. (Mid-Hudson), respectfully allege as follows:

4. On July 26, 1971, Mid-Hudson obtained a judgment in the Supreme Court of the State of New York against J. W. Construction Corp. and Jack Waschitz in the sum of \$7,858.38; on September 9, 1971, the Internal Revenue Service seized and levied upon certain real property

belonging to J. W. Construction Corp. and Jack Waschitz; unaware of the seizure and levy of the Internal Revenue Service of September 9, 1971, Mid-Hudson through the Orange County Sheriff's Office proceeded to an execution on said property and a sale at public auction by the Orange County Sheriff on March 7, 1972; thereafter, on March 17, 1972, the Internal Revenue Service sold the seized property to one Wilkins at a price of \$31,000.00, which sale was completed by delivery of a deed to the said Wilkins; since February 24, 1972, and by due affidavit since May 10, 1972, which said affidavit was addressed to the District Director, Internal Revenue Service, P.O. Box 731, Albany, New York, 12201, and which said affidavit is annexed hereto and marked "Exhibit B", Mid-Hudson has had a valid first and paramount claim to the overage or surplus derived from the Internal Revenue Service sale to said Wilkins; the March 7, 1972, Sheriff's sale was conducted solely because Mid-Hudson was unable to obtain information from the Internal Revenue Service as to the facts of the seizure and levy and not because Mid-Hudson disputed the fact of seizure and levy.

5. Mid-Hudson has the first and primary filed administrative claim for the surplus monies and should be paid from the surplus monies created by the sale to Wilkins the sum of \$7,858.38 with interest from the Internal Revenue Service sale, March 17, 1972.

6. The plaintiff, Baum, upon information and belief, was aware of the Internal Revenue Service seizure and levy on September 9, 1971, at the time his "alleged purchase" of the subject property at the Sheriff's sale held on March 7, 1972; such sale was a nullity and plaintiff derived no estate, right, title or interest therefrom; such rights as plaintiff would have, on the contrary, stem only from his claim to overage pursuant to the Internal Revenue Service sale and only if plaintiff validly

purchased or was assigned a valid claim to overage at the time of his alleged filing of such a claim on May 25, 1972.

WHEREFORE, defendants, Robert Crank and John Sibirtzeff, d/b/a Mid-Hudson Painting & Decorating Co., demand judgment against plaintiff dismissing the complaint herein, together with the costs and disbursements of this action and defendants' reasonable attorneys fees and demand judgment against defendant, United States of America, on their cross claim for the amount of \$7,858.38, together with interest thereon from March 17, 1972.

Yours, etc.,

FABRICANT, LIPMAN, BOYLE & KENNEDY
Attorneys for Mid-Hudson
Office and Post Office Address:
One Harriman Square
P. O. Box 60
Goshen, New York 10924
(914) 294-7944

TO: BAUM & GERSTEN
Attorneys for Plaintiff
Office and Post Office Address:
15 Hamilton Avenue
Monticello, New York 12701

WILLIAM R. BRONNER
Assistant United States Attorney
United States Department of Justice
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
MORTON I. BAUM,

Plaintiff,

-v-

UNITED STATES OF AMERICA,

Defendant.
-----X

:
:
:
: NOTICE OF MOTION

: 72 Civ. 3932 LPG
:

PLEASE TAKE NOTICE that upon the annexed memorandum of law of Whitney North Seymour, Jr., United States Attorney, William R. Bronner, Assistant United States Attorney, of counsel, a motion will be made before the Honorable Lee P. Gagliardi, a Judge of this Court, on the 27th day of March, 1973, at 4:00 in the afternoon, or as soon thereafter as may be convenient to the Court, for an order dismissing the complaint in its entirety for failure to state a claim upon which relief can be granted, or for whatever other relief may be just and equitable in the premises.

Dated: New York, New York

March 9^d, 1973

Yours, etc.,

WHITNEY NORTH SEYMOUR, Jr.
United States Attorney for the
Southern District of New York
Attorney for Defendant

By: William R. Bronner

WILLIAM R. BRONNER
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse
Foley Square
New York, New York 10007
Tel.: (212) 264-6395

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MORTON I. BAUM,

Index No. 72 CIV 3932

Plaintiff,

-against-

AFFIDAVIT IN OPPOSITION
TO MOTION TO INTERVENE

UNITED STATES OF AMERICA,

Defendant.

-----x
STATE OF NEW YORK)

) ss.:

COUNTY OF SULLIVAN)

MORTON I. BAUM, being duly sworn, says:

1. I am the plaintiff in this action and also a member of the firm of Baum & Gersten, Esqs., attorneys for the plaintiff.

2. This affidavit is made in opposition to a motion for an order granting Robert Crank and John Sibirtzeff, doing business as Mid-Hudson Painting & Decorating Co., leave to intervene. The notice of motion dated February 15, 1973 was received by mail at my office, 15 Hamilton Avenue, Monticello, New York, on February 17, 1973.

3. This action was commenced by the filing of the complaint and issuance of the summons by the Clerk of the Court on September 14, 1972. The time of the defendant United States of America within which to answer or make any motion with respect to the complaint has been extended by a number of stipulations to March 5, 1973; and at the time of the making of this affidavit, the answer has not been served.

4. This action was brought to recover surplus monies arising after the sale of seized real property owned by J. W. . Construction Corp., a New York corporation with place of business at R.D. #3, Route 6, Port Jervis, Orange County, New York (property located at same address), in accordance

with provisions of Sec. 6335 of the Internal Revenue Code of 1954, as amended, with jurisdiction conferred upon the Court under provisions of Sec. 7426(a)(2) of the Code, as amended.

5. A copy of my application for surplus monies sworn to May 25, 1972, is attached. It was served in duplicate on Donald Hartley, District Director of Internal Revenue Service, P.O. Box 469, Albany, New York, on May 30, 1972, by certified mail, return receipt requested. The original return receipt is in my file.

6. A copy of the summons and complaint is attached.

7. The moving papers are patently deficient in that they fail to comply with Rule 24(c) of the Federal Rules. A pleading setting forth the claim or defense for which intervention is sought is not attached nor does the motion properly or adequately state the grounds for proposed intervention. The movants' substantive right to succeed has not been clearly shown and if the Court could not grant relief, the motion should be denied.

8. The movants predicate their claim upon their status as judgment creditors having a judgment lien affecting the premises of J.W. which was sold at a sealed bid federal tax sale on March 17, 1972 after levy and proper publication. My claim is as the holder of the equity of redemption of the interests of J.W. arising from proper bid and purchase of the interests of J.W. at a judgment lien sheriff's sale, conducted by the Sheriff of Orange County pursuant to an execution delivered to the Sheriff by the movants, with sale being held on March 7, 1972 at the Orange County Government Center, Main Street, Goshen, New York. Therefore, movants cannot contend that this is a true, hybrid or spurious class action. It is one involving two separate and distinct claimants occupying separate and distinct positions, each seeking title to all or a portion of

the surplus monies resulting from the sealed bid federal tax sale.

9. The movants have not commenced an action within the time required by Sec. 6532(c)(1) of the Code, as amended, and the time within which to do so has expired. The movants should not now be allowed to extend the limitation period by use of the motion to intervene. This is an attempt to do indirectly that which it is too late to do directly. Furthermore, even if the movants had followed the proper procedure pertaining to intervention motions and had timely made the motion to intervene so as to toll the limitation period, the movants have not demonstrated any valid substantive claim to the surplus monies. The sheriff's sale was pursuant to execution issued by the movants. The movants were present throughout the sale and chose to take no affirmative action to protect their interest. By virtue of the sale the judgment lien claimed by them was extinguished as to the J.W. real property. Mine was the successful bid and the real property was eventually conveyed by Sheriff's Deed to me, subject to all liens or proceedings prior to the lien or proceedings taken by movants. All incumbrances subsequent to the lien of the movants were similarly extinguished and I, after proper bid, became the owner of the equity of redemption thereby being entitled to the surplus monies resulting from the federal tax lien sale which took place on March 17, 1972, ten (10) days after the initial judgment lien sale. Movants place great emphasis on my receiving a windfall in an attempt to raise an equitable argument. However, this windfall, if any, (the surplus money figures have not yet been disclosed by the government) is my potential blessing and movants' well earned curse as they chose not to bid.

10. Although the movants imply in their moving papers that they did not have proper notice of the federal tax liens claimed, the seizure and levy made by the representatives of the Internal Revenue Service, this is not the case. Representatives of the Internal Revenue Service seized the J.W. real property on February 17, 1972, and properly advertised the premises for sealed bid sale to be held on March 17, 1972. A copy of the notice of sealed bid sale dated February 17, 1972 is attached. Furthermore, at the earlier judgment lien sale (March 7, 1972) conducted by the Orange County Sheriff, Barbara Herdman and Edmund Klein, agents of the Internal Revenue Service, appeared and announced that the J.W. premises were subject to prior levy and federal tax lien sale scheduled to take place 10 days later on March 17, 1972. This announcement was made orally by Miss Herdman and a notice of levy handed to Deputy Foley of the Orange County Sheriff's Department, who was conducting the sale. The sale was then commenced in the presence of the movants, movants' counsel, Lawrence Kennedy, myself and many others. At this time, the equity of redemption subject to the federal tax liens was deemed to be worthless by the movants who bid only \$1.00 and then stopped. Whereas they could have bid the entire amount of their judgment by credit. In short, they determined not to bid. A copy of the notice of the levy dated March 7, 1972, referred to in this paragraph reciting the federal tax liens which were claimed by the defendant in the total sum of \$24,897.10, is attached.

11. To conclude, the movants' papers are defective; they have not made a timely motion; they have failed to properly demonstrate any right to intervene, and have not stated any facts upon which they would be entitled to a substantive

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determination in their favor if the Court did allow them to
intervene. Their motion should be denied in its entirety.

Morton I. Baum

Sworn to before me this

day of February, 1973

Notary Public

WALTER S. GINSBURG
Notary Public, State of New York
Sullivan County Clerk, 142-188
Commission Expires March 12, 1973

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) SS.:
 COUNTY OF SULLIVAN)

May G. Hickey , being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Monticello, New York . That on the 23 day of February , 1973 , deponent served the within AFFIDAVIT IN OPPOSITION TO MOTION TO INTERVENE upon Fabricant, Lipman, Boyle & Kennedy, Esqs. attorneys for Petitioners in this action at 1 Harriman Square, Goshen, New York, upon Whitney North Jr., U.S. Attorney, attorneys for the Southern District of New York, Attorney for Defendant, U.S. Court House, Foley Square, N.Y., N.Y. ~~XXXXXXXXXXXX~~

upon attorneys for in this action at the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United State Post Office Department within the State of New York.

Sworn to before me this
 23 day of February , 1973 .

May G. Hickey

Notary Public

JOHN L. BAUM
 Notary Public, State of New York
 Clerk's #847
 March 30, 1973

In the Matter

of

APPLICATION FOR
SURPLUS MONIES

MORTON I. BAUM claiming surplus monies
from the sale of real property owned by
J. W. CONSTRUCTION CORP. by the UNITED
STATES OF AMERICA for unpaid taxes.

STATE OF NEW YORK)-----X

) SS:

COUNTY OF SULLIVAN)

MORTON I. BAUM, being duly sworn, says:

1. I maintain offices at 15 Hamilton Avenue, Monticello, New York, and make this affidavit in support of my application for surplus monies arising from a sale of real property owned by J. W. Construction Corp., R. D. 2, Route 6, Port Jervis, New York, by the United States Treasury Department Internal Revenue Service for unpaid taxes.
2. By Sheriff's Deed dated May 18, 1972, a copy of which is attached for all purposes, I became the owner of the equity of redemption as to the property sold pursuant to Notice of Sealed Bid Sale dated February 17, 1972.
3. The sealed bid sale was held on March 17, 1972, and upon information and belief, the property purchased by a party by the name of Wilkens at a price of Thirty-One Thousand and 00/100 (\$31,000.00) Dollars.
4. I hereby make claim to all surplus monies remaining after satisfaction of a lien for unpaid taxes stated in a notice of levy dated March 7, 1972 identified as Tax Form No. 941, period ended 9/30/70, date of assessment 12/11/70, identifying number 14-1468058, unpaid balance of assessment \$3,721.79, statutory additions \$181.84 FTP, \$373.48 interest, a total of \$4,277.11. The notice of this lien was filed in the Orange County Clerk's Office on June 3, 1971, file no. 4049, collectors serial no. 14691.

5. On July 26, 1971, a judgment was entered against J. W. Construction Corp. and Jack Waschitz in favor of Mid-Hudson Painting and Decorating Co. in the sum of Seven Thousand Eight Hundred Fifty-Eight and 38/100 (\$7,858.38) Dollars. By virtue of an execution dated August 30, 1971, the interests of J. W. Construction Corp. and Jack Waschitz, in the premises described in the said Sheriff's Deed, was sold at public auction by the Orange County Sheriff on March 7, 1972. By virtue of this public auction sale, my bid, and delivery of the Sheriff's Deed dated May 18, 1971, I became the owner of all the estate, right, title and interest which on the 26th day of July, 1971, or anytime thereafter, J. W. Construction Corp. and Jack Waschitz had in said premises.

6. By virtue of the proper docketing of the Mid-Hudson Painting and Decorating Co. judgment, issuance of execution, and public auction sale, and under the provisions of Section 6323 of the Internal Revenue Code, all federal tax liens, notice of which were filed with the Orange County Clerk subsequent to the entry of the Mid-Hudson Painting and Decorating Co. judgment, are subordinate to the interests of myself as the owner of the equity of redemption and such liens were properly extinguished by virtue of the execution and public auction sale.

7. This is an application for surplus proceeds under the provisions of Section 6342 (b) of the Internal Revenue Code.

Therefore, it is respectfully asked that the surplus proceeds remaining after payment of the tax lien in the sum of Four Thousand Two Hundred Seventy-Seven and 11/100 (\$4,277.11) Dollars, a sum of approximately Twenty-Six Thousand and 00/100 (\$26,000.00) Dollars be immediately paid over to me by the

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United States Treasury Department.

Morton I. Baum

Sworn to before me this
25th day of May, 1972.

1st
Notary Public

OLGA M. PARLOW
Notary Public, State of New York
Sullivan County Clerk's No. 928
Commission Expires March 30, 1973

THIS INDENTURE, made the 15th day of May, 1972, between WILBUR K. SHERWOOD, as Sheriff of the County of Orange, in the State of New York, having his principal office at No. 40 Erie Street, in the Village of Goshen, Orange County, New York, party of the first part, and MORTON I. BAUM, 15 Hamilton Avenue, Village of Monticello, Sullivan County, New York, party of the second part;.

WHEREAS, a certain execution was issued out of the County Court, Orange County, on the 30th day of August, 1971, on a judgment entered in the County Court, Orange County, in an action between Mid-Hudson Painting & Decorating Co., Plaintiff, and J. W. Construction Corp., and Jack Waschitz, Defendants, on the 26th day of July, 1971, in favor of the Mid-Hudson Painting & Decorating Co., Judgment Creditor, and against J. W. Construction Corp., and Jack Waschitz, Judgment Debtors, for the sum of \$7,858.38, as appears by the judgment roll filed in the office of the Clerk of the County of Orange, which said judgment was docketed in said Clerk's office on the 26th day of July, 1971; and

WHEREAS, said execution was directed and delivered to the Sheriff of Orange County commanding him to satisfy said judgment out of the real property, among other property of the Judgment Debtors, J. W. Construction Corp., and Jack Waschitz; and

WHEREAS, under the terms of the execution, the interest of the said Judgment Debtors, J. W. Construction Corp., and Jack Waschitz, in the premises hereinafter conveyed and described, was subject to the lien of said judgment when the execution was so delivered; and

WHEREAS, the said Sheriff, by virtue of and in obedience to the command of said execution, duly sold at public auction on the 7th day of March, 1972, all the estate, right, title and interest which on the 26th day of July, 1971, or any time thereafter, the said Judgment Debtors, J. W. Construction Corp., and Jack Waschitz, had of, in, and to said premises, having held the sale at the County Court House, Main Street, in the Village of Goshen, in said County of Orange, and having first given public notice of the time and place of such sale by advertising, serving, and posting the same according to law, at which sale the said premises were struck off to Morton I. Baum, party of the second part, for the sum of Five Dollars (\$5.00), being the next highest bidder after the highest bidder withdrew his bid, and that being the highest sum so bidden for the same.

WHEREUPON, the Sheriff of Orange County, after receiving from the said purchaser the said sum of money so bidden as aforesaid, gave to the said Morton I. Baum the proofs of publication, service, and posting of the notice of said sale as directed by the law be given.

NOW THIS INDENTURE WITNESSETH, that the said party of the first part, by virtue of the said execution, and in pursuance of the act in such case made and provided, and in consideration of the sum of money so bidden as aforesaid, to him duly paid, has sold and by these presents does grant and convey unto the said party of the second part, his successors and assigns forever, all the estate, right, title and interest which the said Defendants, J. W. Construction Corp., and Jack Waschitz, had on the 26th day of July, 1971, or any time afterward, of, in, and to:

ALL THAT CERTAIN TRACT OR PARCEL OF LAND located in the Town of Greenville, County of Orange and State of New York, being more particularly described as follows:

BEGINNING at the intersection of the center line of New York State Highway Route 6 and the center line of Monahan Road, and running thence southwesterly along the center line of Monahan Road a distance of 519 feet to a corner; thence along lands of Jennings as marked by a stone wall South 38 degrees and 14 minutes East a distance of 338.4 feet to a standing stone; thence along lands of Weinstock as marked by a wire fence and stone wall North 48 degrees and 17 minutes East a distance of 486.9 feet to a standing stone; thence still along lands of Weinstock as marked by a stone wall South 38 degrees and 06 minutes East a distance of 195 feet to a standing stone; thence still along lands of Weinstock as partly marked by a stone wall North 44 degrees and 20 minutes East a distance of 453.7 feet to an 8 inch pin oak; thence still along lands of Weinstock North 56 degrees and 15 minutes West a distance of 463.2 feet to a corner in the center of New York State Highway Route 6 aforesaid; thence southwesterly along the same a distance of 368 feet to the place of beginning.

Containing 7.4 acres, with the foregoing description being in accordance with a survey made by F. X. Conrad, P.E., July 22, 1968.

SUBJECT, however, to the rights of the public in and to such portions of the public highways as are included within the foregoing description.

BEING the same premises as the First Parcel described in deed from James E. Walker and William V. Walker, all of the distributees of Harriet E. Walker to James E. Walker and William V. Walker, dated October 16, 1966 and recorded in the Orange County, N. Y. Clerk's Office in Book 1727 of Deeds at page 955, with the description of said parcel in accordance with the above mentioned survey made by F. X. Conrad.

TO HAVE AND TO HOLD the said above mentioned and conveyed premises unto the said party of the second part, his successors and assigns forever, as fully and absolutely as the said party of the first part, as Sheriff as aforesaid, can or ought to sell and convey the same by virtue of the said execution and the law relating thereto.

IN WITNESS WHEREOF, the said Wilbur K. Sherwood, Sheriff of the County of Orange, in the State of New York, has fully executed this deed the day and year first above written.

Wilbur K. Sherwood
 Wilbur K. Sherwood
 Sheriff of Orange County

STATE OF NEW YORK)
) SS.:
 COUNTY OF ORANGE)

On the 18TH day of May, 1972, before me personally, came WILBUR K. SHERWOOD, to me known and known to me to be the Sheriff of Orange County, and to me known to be the individual described in and who executed the above conveyance, and he acknowledged to me that he executed the same, as such Sheriff.

Francis J. Foley
 Notary Public

FRANCIS J. FOLEY
 NOTARY PUBLIC, STATE OF NEW YORK
 APPOINTED IN ORANGE COUNTY
 MY COMMISSION EXPIRES MAR. 30, 1974

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. _____

MORTON I. DAUM,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon Baum and Gersten, Esqs.,

plaintiff's attorneys, whose address is 15 Hamilton Avenue, Monticello, New York,
12701, Telephone No. 914 794-5641,

John Livingston, Clerk of Court.

an answer to the complaint which is herewith served upon you, within 60 days after service of this
summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be
taken against you for the relief demanded in the complaint.

John Livingston,

Clerk of Court.

Jeremiah A. Murphy,

Deputy Clerk.

Date: Sept. , 1972

[Seal of Court]

I hereby certify and return, that on the 53a day of

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I received this summons and served it together with the complaint herein as follows:

Date: 2011

2011

U.S. District Court

U.S. District Court

U.S. District Court

taken against you for the relief demanded in the complaint

summons upon your execution of the day of service. It is to be noted that the cost of

MARSHAL'S FEES

Travel and Service to the complaint which is herewith served upon you and to

United States Marshal

By

Deputy United States Marshal.

Subscribed and sworn to before me, a

this

day of 2011, at the address of the defendant.

[SEAL]

Note:—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

You are hereby summoned and required to serve upon the defendant named herein

to the above named Defendant:

No.	United States District Court FOR THE	Plaintiff	Defendant	SUMMONS IN CIVIL ACTION	Returnable not later than after service.	days	Attorney for Plaintiff
							FPI-SS-3-20-69-275M-3996

ONLY COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

54a

-----X
MORTON I. BAUM,

Plaintiff,

-against-

CIVIL ACTION NO.:

UNITED STATES OF AMERICA,

COMPLAINT

Defendant.
-----X

1. Plaintiff is a citizen of the United States of America, residing at R.D. #1, Box 264, Monticello, Sullivan County, New York; this action is to recover surplus moneys arising after sale of seized property in accordance with the provisions of SEC. 6335 of the Internal Revenue Code of 1954, as amended, and jurisdiction is conferred upon this Court under the provisions of SEC. 7426 (a) (2) of the Internal Revenue Code of 1954, as amended.

2. The surplus moneys referred to herein were created by virtue of a sale of real property owned by J. W. Construction Corp., R.D. #2, Route 6, Port Jervis, Orange County, New York, by the United States Treasury Department Internal Revenue Service for unpaid taxes, pursuant to the provisions of SEC. 6335 of the Internal Revenue Code of 1954, as amended, which section regulates the sale of seized property.

3. The sale of seized property was conducted via sealed bid sale on March 17, 1972, and upon information and belief, the real property was purchased by a party by the name of Wilkins at a price of \$31,000.00, which sale was thereafter completed by delivery of a deed to the said Wilkins.

4. Prior to the aforesaid sealed bid sale, on July 26, 1971, a judgment was entered against J. W. Construction Corp. and Jack Waschitz in favor of Mid-Hudson Painting and Decorating Co. in the sum of \$7,858.38, in the Supreme Court of the State of

New York for the County of Orange.

55a

5. By virtue of an execution dated August 30, 1971, delivered to the Sheriff of Orange County, State of New York, the interests of J. W. Construction Corp. and Jack Waschitz, in the same premises sold under the aforesaid sealed bid sale, was sold at public auction by the Orange County Sheriff on March 7, 1972.

6. At the aforesaid public auction held by the Orange County Sheriff on March 7, 1972, plaintiff duly bid, his bid was duly accepted, and the Sheriff of Orange County thereafter duly delivered a Sheriff's Deed dated May 18, 1972, under which deed the plaintiff became the owner of all the estate, right, title and interest which on the 26th day of July, 1971, or any time thereafter, J. W. Construction Corp. and Jack Waschitz had in said premises. A copy of this deed is attached for all purposes.

7. By virtue of the proper docketing of the Mid-Hudson Painting and Decorating Co. judgment, issuance of execution, the provisions of SEC. 6323 of the Internal Revenue Code of 1954, as amended, all Federal tax liens, notice of which were filed with the Orange County Clerk subsequent to the entry of the Mid-Hudson Painting and Decorating Co. judgment, are subordinate to the interests of the plaintiff as the owner of the equity of redemption and such liens were properly extinguished by virtue of the execution and public auction sale.

8. Representatives of the Internal Revenue Service attended the said public auction conducted by the Orange County Sheriff on March 7, 1972.

9. Plaintiff is entitled to all surplus moneys remaining after satisfaction of a Federal tax lien for unpaid taxes stated in a notice of levy dated March 7, 1972 identified as Tax Form No.

941, period ended 9/30/70, date of assessment 12/11/70, identifying number 14-1468058, unpaid balance of assessment \$3,721.79, statutory additions \$181.84 FTP, \$373.48 interest, a total of \$4,277.11. The notice of this lien was filed in the Orange County Clerk's Office on June 3, 1971, file number 4049, collector's serial number 14691.

10. This action has been commenced within the time limitation set forth in SEC. 6532 (c) (1) of the Internal Revenue Code of 1954, as amended.

11. By letter of May 25, 1972, containing an appropriate affidavit, addressed to Donald Hartley, District Director of Internal Revenue Service, Post Office Box 469, Albany, New York, attention, Special Procedures Section, which letter was properly received, demand was duly made that surplus moneys be immediately turned over to the plaintiff, but such demand has been refused.

12. Plaintiff has contacted numerous representatives of the Internal Revenue Service in order to determine the exact amount of surplus monies available, but none of the representatives of the Internal Revenue Service have indicated a willingness to grant such information and have generally been secretive about the entire procedure being followed, except that a representative of the Internal Revenue Service did indicate that the entire matter had been forwarded to the Regional Counsel in the City of New York, State of New York, for processing.

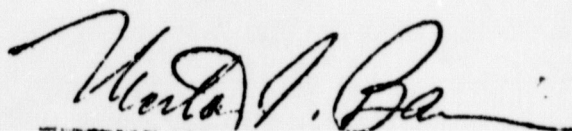
13. The said application for surplus proceeds was made under the provisions of SEC. 6342 (b) of the Internal Revenue Code of 1954, as amended.

WHEREFORE, plaintiff demands judgment against the United States of America in an amount equal to all or any part of the amount of surplus proceeds of the Sealed Bid Sale conducted on March 17, 1972, together with interest at the rate of six (6%) per

57a

cent per annum computed from the date of plaintiff's application
for surplus monies, and costs.

Dated: August 30, 1977



BAUM & GORDON, ESQS.,
Attorneys for Plaintiff,
by Morton I. Baum, partner
Office & P. O. Address
15 Hamilton Avenue
Monticello, New York 12701
914 794-5641

SHERIFF'S DEED

THIS INDENTURE, made the 18th day of May, 1972, LIBER 1907 PC 784

between WILBUR K. SHERWOOD, as Sheriff of the County of Orange, in the State of New York, having his principal office at No. 40 Erie Street, in the Village of Goshen, Orange County, New York, party of the first part, and MORTON I. BAUM, 15 Hamilton Avenue, Village of Monticello, Sullivan County, New York, party of the second part;.

WHEREAS, a certain execution was issued out of the County Court, Orange County, on the 30th day of August, 1971, on a judgment entered in the County Court, Orange County, in an action between Mid-Hudson Painting & Decorating Co., Plaintiff, and J. W. Construction Corp., and Jack Waschitz, Defendants, on the 26th day of July, 1971, in favor of the Mid-Hudson Painting & Decorating Co., Judgment Creditor, and against J. W. Construction Corp., and Jack Waschitz, Judgment Debtors, for the sum of \$7,858.38, as appears by the judgment roll filed in the office of the Clerk of the County of Orange, which said judgment was docketed in said Clerk's office on the 26th day of July, 1971; and

WHEREAS, said execution was directed and delivered to the Sheriff of Orange County commanding him to satisfy said judgment out of the real property, among other property of the Judgment Debtors, J. W. Construction Corp., and Jack Waschitz; and

WHEREAS, under the terms of the execution, the interest of the said Judgment Debtors, J. W. Construction Corp., and Jack Waschitz, in the premises hereinafter conveyed and described, was subject to the lien of said judgment when the execution was so delivered; and

WHEREAS, the said Sheriff, by virtue of and in obedience to the command of said execution, duly sold at public auction on the 7th day of March, 1972, all the estate, right, title and interest which on the 26th day of July, 1971, or any time thereafter, the said Judgment Debtors, J. W. Construction Corp., and Jack Waschitz, had of, in, and to said premises, having held the sale at the County Court House, Main Street, in the Village of Goshen, in said County of Orange, and having first given public notice of the time and place of such sale by advertising, serving, and posting the same according to law, at which sale the said premises were struck off to Morton I. Baum, party of the second part, for the sum of Five Dollars (\$5.00), being the next highest bidder after the highest bidder withdrew his bid, and that being the highest sum so bidden for the same.

WHEREUPON, the Sheriff of Orange County, after receiving from the said purchaser the said sum of money so bidden as aforesaid, gave to the said Morton I. Baum the proofs of publication, service, and posting of the notice of said sale as directed by the law be given.

NOW THIS INDENTURE WITNESSETH, that the said party of the first part, by virtue of the said execution, and in pursuance of the act in such case made and provided, and in consideration of the sum of money so bidden as aforesaid, to him duly paid, has sold and by these presents does grant and convey unto the said party of the second part, his successors and assigns forever, all the estate, right, title and interest which the said Defendants, J. W. Construction Corp., and Jack Waschitz, had on the 26th day of July, 1971, or any time afterward, of, in, and to:

ALL THAT CERTAIN TRACT OR PARCEL OF LAND LOCATED IN THE
Town of Greenville, County of Orange and State of New York,
being more particularly described as follows:

BEGINNING at the intersection of the center line of New York State Highway Route 6 and the center line of Monahan Road, and running thence southwesterly along the center line of Monahan Road a distance of 519 feet to a corner; thence along lands of Jennings as marked by a stone wall South 38 degrees and 14 minutes East a distance of 338.4 feet to a standing stone; thence along lands of Weinstock as marked by a wire fence and stone wall North 48 degrees and 17 minutes East a distance of 486.9 feet to a standing stone; thence still along lands of Weinstock as marked by a stone wall South 38 degrees and 06 minutes East a distance of 195 feet to a standing stone; thence still along lands of Weinstock as partly marked by a stone wall North 44 degrees and 20 minutes East a distance of 453.7 feet to an 8 inch pin oak; thence still along lands of Weinstock North 56 degrees and 15 minutes West a distance of 463.2 feet to a corner in the center of New York State Highway Route 6 aforesaid; thence southwesterly along the same a distance of 368 feet to the place of beginning.

Containing 7.4 acres, with the foregoing description being in accordance with a survey made by F. X. Conrad, P.E., July 22, 1968.

SUBJECT, however, to the rights of the public in and to such portions of the public highways as are included within the foregoing description.

BEING the same premises as the First Parcel described in deed from James E. Walker and William V. Walker, all of the distributees of Harriet E. Walker to James E. Walker and William V. Walker, dated October 16, 1966 and recorded in the Orange County, N. Y. Clerk's Office in Book 1727 of Deeds at page 955, with the description of said parcel in accordance with the above mentioned survey made by F. X. Conrad.

TO HAVE AND TO HOLD the said above mentioned and conveyed premises unto the said party of the second part, his successors and assigns forever, as fully and absolutely as the said party of the first part, as Sheriff as aforesaid, can or ought to sell and convey the same by virtue of the said execution and the law relating thereto.

IN WITNESS WHEREOF, the said Wilbur K. Sherwood, Sheriff of the County of Orange, in the State of New York, has fully executed this deed the day and year first above written.

Wilbur K. Sherwood
 Wilbur K. Sherwood
 Sheriff of Orange County

STATE OF NEW YORK)
) SS.:
 COUNTY OF ORANGE)

On the 18th day of May, 1972, before me personally, came WILBUR K. SHERWOOD, to me known and known to me to be the Sheriff of Orange County, and to me known to be the individual described in and who executed the above conveyance, and he acknowledged to me that he executed the same, as such Sheriff.

Francis J. Foley
 Notary Public

FRANCIS J. FOLEY
 NOTARY PUBLIC, STATE OF NEW YORK
 APPOINTED IN ORANGE COUNTY
 MY COMMISSION EXPIRES MAR. 30, 1974

SHERIFF

WILBUR K.
Sheriff of the Co

CHANCE
COUNTY

0 2 8 8 9 0

REAL ESTATE
TRANSFER TAX
Dept. of
Location MAY 26 72
& Finance
PB. 10951
STATE OF
NEW YORK
00.00
TOP
★ ★ ★ ★ ★

MORTON

Dated: May

Orange County

Recorded

May
P.
Deeds
and Examination

C. N. W.

BAUM & GE

15 HAM

MONTICELL

DEEDS
RECORDS

'S DEED

SHERWOOD
County of Orange

I. BAUM

62a

LIBR 1907 pc 788

1972

26th
72 4:05
Libet 1907
page 784

interse

RSTEN. ESQS.
LTON AVE.
O. N. Y. 12701

~~CONFIDENTIAL~~

NOTICE OF SEALED BID SALE ANNEXED TO FOREGOING AFFIDAVIT
DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

63a

Notice of
SEALED BID SALE

Under authority contained in section 6331 of the Internal Revenue Code, the property described below has been seized for nonpayment of delinquent internal revenue taxes due from

J W CONSTRUCTION CORP.

The property will be sold at public auction under sealed bids in accordance with the provisions of section 6335 of the Internal Revenue Code and pertinent regulations.

DATE BIDS WILL BE OPENED March 17 1972 TIME BIDS WILL BE OPENED 10 A.M.-P.M.

PLACE OF SALE Internal Revenue Service, 45 Dolson Ave., Middletown, N.Y.

ITEM OR GROUP NO.

DESCRIPTION OF PROPERTY

All that certain tract or parcel of land located in the Town of Greenville, County of Orange and State of New York, being more particularly described as follows:

Beginning at the intersection of the center line of New York State Highway Route 6 and the center line of Monahan Road, and running thence southwesterly along the center line of Monahan Road a distance of 519 feet to a corner; thence along lands of Jennings as marked by a stone wall South 38 degrees and 14 minutes East a distance of 338.4 feet to a standing stone; thence along lands of Weinstock as marked by a wire fence and stone wall North 48 degrees and 17 minutes East a distance of 486.9 feet to a standing stone; thence still along lands of Weinstock as marked by a stone wall South 38 degrees and 06 minutes East a distance (continued on next sheet)

PROPERTY MAY BE INSPECTED AT: J.W. Construction Corp, RD 2 Rt 6, Port Jervis, N.Y.
Corner of Monahan Rd. & Rt 6 on March 10, 1972 at 10A.M.
SUBMISSION OF BIDS: All bids must be submitted on Internal Revenue Service Form 2222, Sealed Bid for Purchase of Seized Property. Contact office below for Forms 2222 and information concerning the property. Submit bids to the Revenue official named below prior to the opening of the bids.

PAYMENT TERMS: Bids must be accompanied by the full amount of the bid if it totals \$200 or less. If the total bid is more than \$200, submit 20 percent of the bid or \$200, whichever is greater. Upon acceptance of the highest bid, the balance due, if any, will be ☒ Required in Full ☐ Deferred as follows:

TYPE OF PAYMENT: All payments must be by cash, certified check, cashier's or treasurer's check or by a United States postal, express or telegraph money order. Make checks and money orders payable to "Internal Revenue Service."

TITLE OFFERED: Only the right, title, and interest of J.W. Construction Corp. in and to the property will be offered for sale. (See back of this form for redemption rights.)

SIGNATURE <i>Barbara H. C.</i>	NAME AND TITLE (Typed) Revenue Officer	DATE 2/17/72
ADDRESS FOR INFORMATION CONCERNING SALE AND SUBMISSION OF BIDS Internal Revenue Service, 45 Dolson Ave., Middletown, N.Y.		PHONE 343-1196

Notice Of SEALED BID SALE

Under authority contained in section 6331 of the Internal Revenue Code, the property described below has been seized for nonpayment of delinquent internal revenue taxes due from

J.W. CONSTRUCTION CORP.

The property will be sold at public auction under sealed bids in accordance with the provisions of section 6335 of the Internal Revenue Code and pertinent regulations.

DATE BIDS WILL BE OPENED March 17 1972 TIME BIDS WILL BE OPENED 10 A.M.-P.M.

PLACE OF SALE Internal Revenue Service, 45 Dolson Ave., Middletown, N.Y.

ITEM OR GROUP NO.

DESCRIPTION OF PROPERTY

of 195 feet to a standing stone; thence still along lands of Weinstock as partly marked by a stone wall North 44 degrees and 20 minutes East a distance of 453.7 feet to an 8 inch pin oak; thence still along lands of Weinstock North 56 degrees and 15 minutes West a distance of 463.2 feet to a corner in the center of New York State Highway Route 6 aforesaid; thence southwesterly along the same a distance of 368 feet to the place of beginning.

Containing 7.4 acres, with the foregoing description being in accordance with a survey made by P. V. Conrad, P.E. July 22, 1968.

Located on the aforementioned described property is a one story, six room frame and brick residence with garage. Approximate size: 24 feet by 32 feet.

PROPERTY MAY BE INSPECTED AT: J W Construction Corp, RD 2 Rt 6, Port Jervis, N.Y.
Corner of Monahan Rd. & Rt 6 March 10, 1972- 10 A.M.
SUBMISSION OF BIDS: All bids must be submitted on Internal Revenue Service Form 2222, Sealed Bid for Purchase of Seized Property. Contact office below for Forms 2222 and information concerning the property. Submit bids to the Revenue official named below prior to the opening of the bids.

PAYMENT TERMS: Bids must be accompanied by the full amount of the bid if it totals \$200 or less. If the total bid is more than \$200, submit 20 percent of the bid or \$200, whichever is greater. Upon acceptance of the highest bid, the balance due, if any, will be ☒ Required in Full ☐ Deferred as follows:

TYPE OF PAYMENT: All payments must be by cash, certified check, cashier's or treasurer's check or by a United States postal, express or telegraph money order. Make checks and money orders payable to "Internal Revenue Service."

FILE OFFERED: Only the right, title, and interest of J.W. Construction Corp. in and to the property will be offered for sale. (See back of this form for redemption rights.)

NATURE <i>John H. H. H.</i>	NAME AND TITLE (Typed) Revenue Officer	DATE 2/17/72
ADDRESS FOR INFORMATION CONCERNING SALE AND SUBMISSION OF BIDS Internal Revenue Service, 45 Dolson Ave., Middletown, N.Y.		PHONE 343-1196

NOTICE OF LEVY ANNEXED TO FOREGOING AFFIDAVIT

65a

FORM 668-A
(REV. FEB. 1967)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

DATE
March 7, 1972

NOTICE OF LEVY

18

Frank Foley
Sheriff of Orange County
40 Erie
Goshen, N.Y. 10924



ORIGINATING DISTRICT
Albany, N.Y.

You are hereby notified that there is now due, owing and unpaid to the United States of America from the taxpayer whose name appears below the sum of \$ 24,897.10

TAX FORM NO.	PERIOD ENDED	DATE OF ASSESSMENT	IDENTIFYING NO.	UNPAID BALANCE OF ASSESSMENT	STATUTORY ADDITIONS	TOTAL
911	9/30/70	12-11-70	14-1168058	\$ 3,721.79	\$ 181.84 FTP	\$ 4,277.11
911	12/31/70	05-11-71	14-1168058	3,930.05	373.48 int	4,074.30
911	6/30/71	11-16-71	14-1168058	7,199.55	75.77 FTP	9,103.16
911	9/30/71	3-28-72	14-1168058	9,103.16	68.48 int	
					70.99 FTP	
					123.99 int	
					Lien Fees 48.00	
TOTAL AMOUNT DUE						\$24,897.10

You are further notified that demand has been made for the amount set forth herein upon the taxpayer who has neglected or refused to pay, and that such amount is still due, owing, and unpaid from this taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer, or on which there is a lien provided under Chapter 64, Internal Revenue Code of 1954, are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability. Checks or money orders should be made payable to "Internal Revenue Service".

SIGNATURE *[Signature]* TITLE Revenue Officer ADDRESS (CITY AND STATE) Middletown, N.Y.

(Name and Address of Taxpayer)

J W Construction Corp
RD 2 Rt 6
Port Jarvis, N.Y. 12701

CERTIFICATE OF SERVICE

I hereby certify that this levy was served by delivering a copy of this notice of levy to the person named below.

NAME *Frank Foley*
TITLE *Sheriff*
DATE AND TIME *3/7/72 11:35*
SIGNATURE OF REVENUE OFFICER *[Signature]*

PART 2 - TO BE RETAINED BY ADDRESSEE

FORM 668-A (REV. 2-67)

AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS (Filed March 17, 1973)
 UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

-----X
 MORTON I. BAUM,

Plaintiff,

Index No. 72 Civ. 3928

-against-

UNITED STATES OF AMERICA,

AFFIDAVIT IN OPPOSITION
 TO MOTION TO DISMISS

Defendant.

-----X
 STATE OF NEW YORK)
) ss.:
 COUNTY OF SULLIVAN)

MORTON I. BAUM, being duly sworn, says:

1. I am the plaintiff in this action and also a member of the firm of Baum and Gersten, Esqs., attorneys for the plaintiff.

2. This affidavit is made in opposition to a motion for an order dismissing the complaint in its entirety for failure to state a claim upon which relief can be granted by notice of motion dated March 9, 1973, in accordance with Rule 12 (b) of the Federal Rules. The motion is returnable before Hon. Lee P. Gagliardi, a Judge of this Court, on March 27, 1973, at 4:00 P.M.

3. The motion to dismiss should be denied because the complaint dated August 30, 1972 does state a cause of action.

4. For purposes of a motion to dismiss, the material allegations of the complaint are deemed to be admitted. Unless it appears to a certainty that a plaintiff is entitled to no relief under any state of facts which could be proved in support of his claim, the complaint should not be dismissed for insufficiency. Further, the pleading is to be liberally construed.

5. Without commenting on the correctness or incorrectness of the facts and allegations stated in the United States Attorney's memorandum of law, unless the facts are stated in the complaint being attacked, they should not be considered as they are not properly before the Court for purposes of this motion.

6. Plaintiff's cause of action is based upon his claim to surplus moneys in accordance with the provisions of Sections 6335 and 7426 (a) (2) of the Internal Revenue Code of 1954, as amended. These surplus moneys came into existence after sale on March 17, 1972 of real property owned by J. W. Construction Corp. for non-payment of certain Federal taxes.

7. Plaintiff is the owner of all the estate, right, title, and interest of J. W. Construction Corp., or otherwise stated, the equity of redemption, as a result of his purchase of the property owned by J. W. Construction Corp. (same property as sold by Internal Revenue Service) at an Orange County Sheriff's sale held on March 17, 1972. A Sheriff's deed having been later delivered. The Sheriff's sale was conducted as a result of an execution issued and delivered to the Sheriff by Mid-Hudson Painting and Decorating Co., a judgment creditor of J. W. Construction Corp., whose judgment had been entered and docketed with the Orange County Clerk on July 26, 1971. Plaintiff's purchase was subject to any liens or encumbrances affecting the property prior to July 26, 1971, not extinguished by the Sheriff's sale in accordance with the provisions of Section 5236 of the Civil Practice Law and Rules of the State of New York.

8. Under the provisions of Section 6337 (b) of the Code, plaintiff, as the holder of the equity of redemption or estate, right, title, and interest of J. W. Construction Corp.,

had a right to redeem at any time within 120 days after the sale, if he chose.

9. The issue raised by the defendant, as to possession of the property by representatives of Internal Revenue Service, is not relevant or material to plaintiff's action and actually has no effect or bearing on the results of the Federal tax sale or results of the Sheriff's execution sale. Possession is not an issue. We are dealing with surplus proceeds which have taken the place of the real property.

10. Although the exact amount of surplus proceeds has not been accurately stated, it appears that the proceeds were adequate to satisfy the federal tax lien or liens involved, thereby leaving surplus proceeds to which the plaintiff is entitled.

11. The complaint clearly states plaintiff's cause of action and the motion to dismiss should be denied in its entirety.

/s/

MORTON I. BAUM

Sworn to before me this
16th day of March, 1973.

/s/
Olga M. Parlów
Notary Public, State of New York
Sullivan County Clerk's No. 928
Commission expires March 30, 1973

WRB:jfp
72-3193

REPLY AFFIDAVIT OF WILLIAM R. BRONNER (Filed March 23, 1973) 69a
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
MORTON I. BAUM :

Plaintiff :

-v- :

REPLY AFFIDAVIT
72 Civ. 3932

UNITED STATES OF AMERICA, :

Defendant. :
-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

WILLIAM R. BRONNER, being duly sworn states:

1. I am an Assistant United States Attorney in the office of Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, attorney for defendant. I make this affidavit in support of the pending motion to dismiss the complaint on the ground that plaintiff lacks standing.

2. I have recently been served with an opposition affidavit which, expressly not controverting any factual allegations, apparently makes a technical objection to the form of the present motion.

3. I am in possession of and am familiar with the administrative file of the Internal Revenue Service relating to the subject matter of this dispute. Based on this material and my knowledge of the facts generally, I can state that the facts alleged in the Statement of Facts in the Government's memorandum on this motion are the material facts in this action and that, under Rule 9 (g) of the General Rules of this Court, they are undisputed.

4. Based on the law as summarized in the Government's memorandum, which has not been challenged, plaintiff lacks the requisite interest upon which to predicate standing, and accordingly the complaint can be dismissed under either Rule 12(b)(6) or Rules 12(b) (last sentence) and 56(b), Fed. R. Civ. P.

W. R. Bronner

WILLIAM R. BRONNER
Assistant United States Attorney

Sworn to before me this
17 day of March, 1973.

WRB:kj
72-3193

STATEMENT ANNEXED TO FOREGOING AFFIDAVIT
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

71a

----- x
MORTON I. BAUM, :
Plaintiff, :
- v - : STATEMENT PURSUANT
: TO RULE 9(C)
UNITED STATES OF AMERICA, : 72 Civ. 3932
Defendant. :
----- x

Pursuant to the General Rules of this Court, Defendants enumerate the following material facts as to which there is no dispute.

1. J. W. Construction Corp. ("J.W.") owed federal taxes in 1971 and 1972 in the aggregate amount of \$27,045.94 including statutory additions.
2. J. W. at that time owned realty and personally located in Orange County, New York.
3. Mid-Hudson Painting and Decorating Co. ("Mid-Hudson") was a judgment lien creditor of J.W.
4. Mid-Hudson delivered an execution to the Orange County Sheriff on August 30, 1971.
5. The Internal Revenue Service ("IRS") posted a notice of seizure at the situs of J.W.'s real property on September 9, 1971.
6. The Orange County Sheriff ("the Sheriff") posted his notice of seizure over that of IRS on October 4, 1971.
7. The Sheriff conducted an execution "sale" on March 7, 1972.
8. At that "sale" plaintiff was the high bidder, and eventually received a Sheriff's deed in consideration

of his \$5.00 bid.

9. IRS conducted a sealed bid sale on March 17, 1972, and sold the same property as that involved in Mid-Hudson's judgment execution.

10. IRS received a high bid of \$31,010.00 for the property.

Dated: New York, New York

March 22, 1973.

Yours, etc.

WHITNEY NORTH SHYMOUR, JR.
United States Attorney

William Roche Bronner

By: _____

WILLIAM R. BRONNER
Assistant United States Attorney

STIPULATION (Filed March 29, 1973)
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73a

U.S. DISTRICT COURT
FILED 3-29-73
S.D. of NEW YORK

MORTON I. BAUM,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.

STIPULATION

72 Civ. 3932 LPG

IT IS HEREBY STIPULATED that the Notice of Motion for an order dismissing complaint dated March 9, 1973, returnable before Hon. Lee P. Gagliardi, Judge of this Court, on the 27th day of March, 1973, 4:00 P.M., be adjourned for all purposes to April 10, 1973, 4:00 P.M., and that an order may be entered on this stipulation without further notice.

Dated: March 23, 1973

BAUM & GERSTEN, ESQS.
Attorneys for Plaintiff
15 Hamilton Avenue
Monticello, New York 12701
914 794-5641

By: Morton I. Baum
MORTON I. BAUM, ESQ.

WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendant

By: William R. Bronner
WILLIAM R. BRONNER
Assistant United States Attorney
Office and Post Office Address
United States Courthouse
Foley Square
New York, New York 10007
212 264-6395

SO ORDERED, MARCH 29, 1973

Lee P. Gagliardi
HON. LEE P. GAGLIARDI, Judge

STIPULATION (Filed July 24, 1973)
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74a

-----x
MORTON I. BAUM,

U.S. DISTRICT COURT
FILED 7-24-73
S.D. of NEW YORK

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.
-----x

STIPULATION OF FACTS
FOR PURPOSES OF MOTION
TO DISMISS AND FOR
SUMMARY JUDGMENT AND
FOR CROSS-MOTION FOR
SUMMARY JUDGMENT
Index No. 72 Civ. 3932

IT IS STIPULATED that the following is an agreed statement of facts for the purposes of a motion to dismiss and for summary judgment brought on by the defendant and cross-motion for summary judgment brought on by the plaintiff.

This action was brought to recover surplus monies arising after sale by I. R. S. of seized real property owned by J. W. Construction Corp., pursuant to the provisions of 26 U. S. C.A. (I. R. C. 1954) Sections 6335, 7425 (b) and 7426 (a) (2), for non-payment of certain federal taxes.

The action was commenced by the filing of the complaint and issuance of the summons by the Clerk of the Court on September 14, 1972. Defendant, by stipulation, extended its time to answer or otherwise move to March 5, 1973. An answer has not yet been served.

Representatives of I. R. S. posted a notice of seizure at the real property of J. W. Construction Corp., located on Route 6, R. D. #3, Town of Greenville, Orange County, New York, on September 9, 1971. This property was later sold by I. R. S. at an administrative sealed bid sale held on March 17, 1972 after publication of a notice of sealed bid sale dated February 17, 1972. The property was purchased by a person named Wilkin at a price of \$31,010.00. Defendant claimed federal tax liens, and will eventually account for actual amounts affecting the premises as follows:

PERIOD ENDING

DATE OF ASSESSMENT

PRINCIPAL, INTEREST
AND PENALTIES 75a

9/30/70	12/11/70	\$ 4,277.11
12/31/70	5/14/71	4,074.30
6/30/71	11/16/71	7,394.53
9/30/71	1/28/72	9,151.16
		<u>\$24,897.10</u>

On July 26, 1971, a judgment was entered against J. W. Construction Corp. and Jack Waschitz in favor of Mid-Hudson Painting and Decorating Co. in the amount of \$7,585.38. This judgment was entered in the Supreme Court, State of New York for the County of Orange and docketed in the Orange County Clerk's Office.

Thereafter, Mid-Hudson issued an execution dated August 30, 1971 on the judgment and delivered it to the Orange County Sheriff. The Orange County Sheriff posted his notice of levy on the real property of J. W. Construction Corp. on October 4, 1971. Pursuant to notice of sale dated January 4, 1972, the Sheriff advertised for sale at public auction, on March 7, 1972, the same premises to be sold by I. R. S. on March 17, 1972 for the unpaid federal tax liens.

Prior to the Sheriff's sale held on March 7, 1972, the Orange County Sheriff posted a Notice of Sale at three places in the Town of Greenville and three places in the Town of Goshen, all six being posted on January 18, 1972. In addition, a copy of the Notice of Sale was published in the Middletown Times-Herald Record, a newspaper having general circulation in Orange County and its surrounding vicinity, in issues of January 7, 21, February 4, and 18 of 1972. A copy of the Notice of Sale was served by certified mail, return receipt requested, on State Tax Commission, Mid-Hudson Painting and Decorating Co., Charles G. Smith Assoc., Inc., National Union Bank of Monticello, Public Service Mutual Insurance Company, Empire National Bank, Murphy Door Bed Co., Inc., Industrial Commissioner of the State of New York, Mid-Hudson Automatic Sprinkler Co., Inc., and Hatfield Bros., Inc. A copy of the Notice of Sale, certified mail, return receipt

requested, was not served upon I. R. S. or its delegate. However, plaintiff contends that actual notice of the proposed Sheriff's sale was received by authorized representatives of I.R.S. at least twenty-five days prior to the date of sale. Defendant admits actual notice but does not recall whether or not notice was acquired at least twenty-five days prior to the sale.

Plaintiff bid in the property and interest of J.W. Construction Corp. at the Orange County Sheriff's Sale held on March 7, 1972, and later received a Sheriff's Deed dated May 18, 1972. Representatives of the I.R.S. attended the public auction held by the Orange County Sheriff and announced that the property being sold at the Sheriff's sale was subject to federal tax liens and prior levy by I. R. S. and sealed bid sale to be held on March 17, 1972, 10 days later. The Sheriff then completed the auction with the plaintiff being the successful bidder.

The records maintained by the Orange County Clerk indicate the following for the period commencing September 16, 1968 and ending March 6, 1972.

1.

James E. Walker & William
V. Walker

to

J. W. Construction Corp.

Conveys: Encumbered premises.

Deed

Dated: 9/16/68

Rec'd: 9/17/68

Liber: 1803, p. 993

2.

J. W. Construction Corp.

to

James E. Walker & William
V. Walker

Secures: Encumbered premises.

Mortgage

Dated: 9/16/68

Rec'd: 9/17/68

Liber: 1519, p. 782

Amount: \$10,000.00

2a.

U. S. A.

v.

J. W. Construction Corp.

Federal Tax Lien

Amount: \$8,082.76

Filed: 4/26/71

(Discharged)

3.

Fallsburg Iron Works, Inc.,
et al.

v.

J. W. Construction Corp.

Notice of Pendency

Amount: \$19,829.26

Dated: 4/28/71

Filed: 4/29/71

Index No.: 1306/71

State Tax Commission

v.

J. W. Construction Corp.

N.Y.S. Tax Warrant & Lien
Amount: \$6,465.55
Filed: 5/12/71
See: Corrected Lien #4111

5.

U. S. A.

v.

J. W. Construction Corp.

Federal Tax Lien
Collector's serial #14691
Amount: \$9,092.98
File: 4049
Filed: 6/3/71

6.

Mid-Hudson Painting &
Decorating Co.

v.

J. W. Construction Corp.

Judgment
Amount: \$7,858.38
Entered: 7/26/71

7.

Chas. G. Smith Associates, Inc.

v.

J. W. Construction Corp. &
Jack Waschitz

Judgment
Amount: \$5,292.21
Entered: 8/3/71

8.

State Tax Commission

v.

J. W. Construction Corp.

N.Y.S. Tax Warrant & Lien
Amount: \$731.88
Entered: 8/12/71

9.

U. S. A.

v.

J. W. Construction Corp.

Federal Tax Lien
Collector's Serial #15417
Amount: \$3,930.05
File No.: 4120
Filed: 8/26/71

10.

National Union Bank of
Monticello, N. Y.

v.

J. W. Construction Corp. &
Jack Waschitz

Judgment
Amount: \$18,297.05
Entered: 9/16/71

78a
11.

Public Service Mutual Ins.
Co.

v.

J. W. Construction Corp.

Judgment
Amount: \$2,352.89
Entered: 10/4/71

12.

Murphy Door Bad Co., Inc.

v.

J. W. Construction Corp.

Judgment
Amount: \$1,664.32
Entered: 11/15/71

13.

Industrial Commissioner

v.

J. W. Construction Corp.

N.Y.S. Tax Warrant & Lien
Amount: \$782.70
Filed: 12/16/71

14.

Mid-Hudson Automatic Sprinkler
Co., Inc.

v.

J. W. Construction Corp.

Judgment
Amount: \$1,937.34
Entered: 12/29/71

15.

U. S. A.

v.

J. W. Construction Corp.

Federal Tax Lien
Collector's Serial #16767
Amount: \$2,807.90
File: #4229
Filed: 12/31/71

16.

Hatfield Bros., Inc.

v.

J. W. Construction

Judgment
Amount: \$19,213.05
Filed: 1/14/72

17.

Industrial Commissioner

v.

J. W. Construction Corp.

N.Y.S. Tax Warrant & Lien
Amount: \$627.87
Filed: 1/20/72

79a
18.

U. S. A.

v.

J. W. Construction Corp.

Federal Tax Lien
Collector's Serial #16752
Amount: \$16,302.71
File #4272
Filed: 2/18/72

19.

Tri-Co Electric Corp.

v.

J. W. Construction Corp.

Judgment
Amount: \$24,818.90
Filed: 2/28/72

20.

Peter Annis, Inc.

v.

J. W. Construction Corp.

Judgment
Amount: \$6,209.00
Filed: Mar. 1, 1972

Dated: June 13, 1973

Morton I. Baum

BAUM & GERSTEN, ESQS.

By: Morton I. Baum

Paul J. Curran

WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York,
Attorney for Defendant

By: *William R. Bronner*

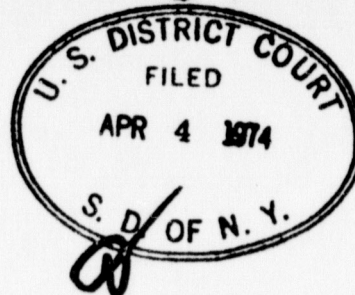
William R. Bronner

Asst. United States Attorney

FABRICANT, LIPMAN, BOYLE, & KENNEDY, ESQS.
Attorneys for Intervenor-Movants,
Mid-Hudson Painting and Decorating Co.

By: *Lawrence X. Kennedy*
Lawrence X. Kennedy

JUDGMENT (Filed April 4, 1974)



80a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
MORTON I. BAUM,

Plaintiff,

: 72 Civil 3932(LPG)

-against-

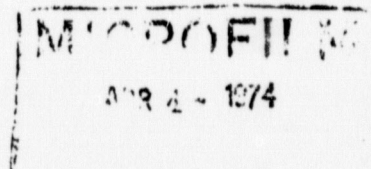
: JUDGMENT

UNITED STATES OF AMERICA,

:
Defendant.
----- X

Motions by both parties having been made to the Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and defendant having moved the Court to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and the said motions having come on to be heard before the Honorable Lee P. Cagliardi, United States District Judge, and the Court thereafter on April 2, 1974, having handed down its memorandum decision granting the motion of the defendant for summary judgment dismissing the complaint, it is,

ORDERED, ADJUDGED AND DECREED, that defendant, UNITED STATES OF AMERICA, have summary judgment against the plaintiff, MORTON I. BAUM, dismissing the complaint.



Dated: New York, N. Y.

April 4, 1974

Raymond F. Burghardt
Clerk

NOTICE OF MOTION TO REARGUE (Filed April 12, 1974)
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81a

-----X
MORTON I. BAUM,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.
-----X

NOTICE OF MOTION
TO RE-ARGUE

72 Civ. 3932 LPG

PLEASE TAKE NOTICE, that upon the annexed affidavit of Morton I. Baum, Esq., sworn to the 9th day of April, 1974, a motion will be made by the plaintiff before the Hon. Lee P. Gagliardi, a Judge of this Court at the United States Courthouse, Foley Square, N. Y., N. Y., on the 23rd day of April, 1974, at 4:00 o'clock in the afternoon on that day, or as soon thereafter as convenient to the Court, for an Order granting leave to re-argue and for reconsideration of the Order of the Court dated February 14, 1974, and thereafter filed in this Court on April 2, 1974, which said Order granted the defendant's motion for summary judgment upon the grounds that said Order did not direct that the surplus money remaining after payment of the defendant's claim be paid to the plaintiff, the person entitled thereto, by reason of his being the holder of the equity of redemption, and for such other and further relief as may be just and equitable in the premises.

Dated: Monticello, New York
April 9, 1974

Yours, etc.,

BAUM & GERSTEN, ESQS.
Attorneys for Plaintiff
15 Hamilton Avenue
Monticello, New York 12701
914 794-5641

To: UNITED STATES ATTORNEY
Southern District of N.Y.
United States Courthouse
Foley Square
New York, N. Y. 10007

FABRICANT, LIPMAN, BOYLE & KENNEDY, ESQS.
252 Main Street
Goshen, N.Y. 10924

AFFIDAVIT OF MORTON I. BAUM ANNEXED TO FOREGOING NOTICE OF
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----X
MOTION

82a

MORTON I. BAUM,

Plaintiff,

-against-

AFFIDAVIT

UNITED STATES OF AMERICA,

72 CIV. 3932 LPG

Defendant.

STATE OF NEW YORK)

) ss.:

COUNTY OF SULLIVAN)

Morton I. Baum, being duly sworn, deposes and says:

1. He is one of the attorneys for the plaintiff in the above entitled action and makes this affidavit in support of a motion to re-argue the motion and cross-motion for summary judgment heretofore made. The decision and order of Hon. Lee P. Gagliardi dated February 14, 1974, was filed with the Clerk of United States District Court, Southern District of New York, on April 2, 1974.

2. This action was brought to recover surplus moneys arising after sale by the I. R. S. of seized real property owned by J. W. Construction Corp. pursuant to the provisions of U. S. C. A. (I. R. C. 1954) Section 6335, 7425 (b) and 7426 (a) (2), for non-payment of certain Federal taxes.

3. Prior to the sale held by the I. R. S., the plaintiff purchased said real property owned by J. W. Construction Corp., subject to all liens and encumbrances, at a sale held by the Sheriff of Orange County, New York, pursuant to an execution issued by a judgment creditor.

4. By reason of plaintiff's purchasing the real property owned by J. W. Construction Corp., and the subsequent delivery to him of a deed thereto by the Orange County Sheriff, the plaintiff became the owner of the equity of redemption and was, and is, entitled to any surplus moneys arising after application of the

to the tax liens of I. R. S. 83a

5. In its memorandum decision dated February 14, 1974, the Court recognized that the plaintiff had standing to bring this action and by implication, therefore, is entitled to any surplus remaining after I. R. S. was paid. The Court made no express determination of plaintiff's cross motion for summary judgment pertaining to this surplus.

6. In granting summary judgment in favor of the defendant, the Court held that the defendant's liens arising from the filing of federal tax liens against J. W. Construction Corp. were not extinguished by the sale held by the Orange County Sheriff because of the fact that the defendant never received written notice at least 25 days prior to the Sheriff's sale as provided in Section 7425 (c) of the Internal Revenue Code.

7. Although the decision indicates that the plaintiff had standing to bring the action, it did not include a direction that the surplus money remaining be paid to the plaintiff after the satisfaction of the I. R. S. liens.

8. Plaintiff respectfully prays that the Court grant his motion for leave to re-argue, reconsider the decision and order dated February 14, 1974, determine plaintiff's cross motion for summary judgment, and include therein a direction that any surplus money be paid to the plaintiff, and for such other and further relief as the Court deems just and proper.

Morton I. Baum

Sworn to before me this
9th day of April, 1974.

Notary Public

OLGA M. PARLOW
Notary Public, State of New York
Sullivan County Clerk's No. 028

AFFIDAVIT OF SERVICE BY MAIL

84a

STATE OF NEW YORK)
) ss.:
COUNTY OF SULLIVAN)
Olga M. Parlow

being duly sworn, deposes and
says, that deponent is not a party to the action. is over 18 years
RD #1, Monticello, New York
of age and resides at
11th April 4 . That
on the day of 197 , deponent served the
Notice of Motion to Re-Argue with Supporting Affidavit
within United States Attorney,
defendant,
upon N.Y., United States Courthouse, Foley Square, N.Y. at N.Y.10007
Fabricant, Lipman, Boyle & Kennedy
upon Goshen, N. Y., attorneys for
in this action at 252 Main St.,
upon attorneys for
in this action at
the address designated by said attorneys for that purpose by deposit-
ing a true copy of same enclosed in a postpaid properly addressed
wrapper, in an official depository under the exclusive care and
custody of the United State Post Office Department within the
State of New York.

/s/ Olga M. Parlow

Sworn to before me this
11th April, 4
day of , 197 .

Notary Public

MORTON L. BART
Notary Public, State of New York
Sullivan County Clerk's #247
Commission Expires March 30, 1973

NOTICE OF APPEAL (Filed April 17, 1974)
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85a

-----x
MORTON I. BAUM,

Plaintiff,

File No. 72 Civ. 3932 LPG

-against-

NOTICE OF APPEAL

UNITED STATES OF AMERICA,

Defendant.
-----x

NOTICE is hereby given that Morton I. Baum, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of Hon. Lee F. Gagliardi, granting summary judgment in favor of the defendant and entered in this action on April 2, 1974.

Dated: Monticello, New York
April 11, 1974

SADU & GERSTEN, ESQS.
Attorneys for Plaintiff
Office & P. O. Address
15 Hamilton Avenue
Monticello, New York, 12701
(914) 794-5641

SOUTHERN DISTRICT OF NEW YORK

----- x

MORTON I. BAUM,

Plaintiff,

- v -

:

:

AFFIDAVIT

72 Civ. 3932

UNITED STATES OF AMERICA,

Defendant.

:

----- x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

WILLIAM R. BRONNER, being duly sworn, deposes
and says:

1. I am an Assistant United States Attorney
in the office of Paul J. Curran, United States Attorney
for the Southern District of New York, and am assigned to
and am familiar with the present action. I make this
affidavit in opposition to the motion of plaintiff Baum
insofar as that motion seeks reconsideration of the grant-
ing of summary judgment to the United States of America.

2. The relevant facts involved herein have been
stated by the Court and need no repetition.

3. At this point in the litigation, there are
three parties in interest: Mid-Hudson Painting and
Decorating Co. (Mid-Hudson), Mr. Baum, and the United
States. Each had originally made a motion; the United
States, for summary judgment of dismissal of Baum's
complaint, Baum, for summary judgment in his favor, and

Mid-Hudson, for leave to intervene as a party plaintiff. These three parties entered into a stipulation of the entire factual record.

4. The Court's opinion determined that, vis-a-vis Baum and the United States, the United States was entitled to priority in the application of the \$31,010.00 received upon the Internal Revenue Service administrative sealed bid sale of the taxpayer's property. This leaves two issues unresolved: the amount of money, if any, to which proposed intervenor Mid-Hudson is entitled, and the identity of the party entitled to the surplus, if any, remaining after application of the proceeds of the Internal Revenue Service sale to the Internal Revenue Service and Mid-Hudson's liens.

5. It is the government's contention, for the reasons previously stated in its memoranda of law, that plaintiff Baum is entitled to nothing. The government's argument may be summarized as follows:

The Internal Revenue Service levied upon the property at issue in September of 1972 by posting a notice of seizure and brought it within the government's exclusive control. At the time it did this there was no order or process of any Court which would have prevented the levy. The only alleged process, the execution delivered to the Orange County sheriff, was insufficient to bring the property within the custody of the Orange County Supreme Court, since it had not been acted upon by the sheriff at the time the Internal Revenue Service seized the property.

It is the government's contention that the property, being within the government's exclusive custody, could not have been brought within a state court's custody through judgment execution or otherwise. The sheriff never acquired anything to sell. Baum's claim, founded upon a "purchase" from the sheriff, therefore lacks merit.

6. As regards Mid-Hudson, the government concedes the priority of its claim as against certain of the tax liens. Baum argues that Mid-Hudson was divested of any lien by the sheriff's "sale", but the government contends that, since the state court and its officer, the sheriff, never acquired jurisdiction over the property (for the reason stated in paragraph 5 above), nothing the sheriff did had any legal effect, either in Baum's favor or to Mid-Hudson's prejudice.

7. In short, under the government's theory, the proposed intervenor, Mid-Hudson, is essentially entitled to first application of the proceeds, the government to second, and Baum, if anywhere, only afterwards. The proceeds of the sale of the property are insufficient to satisfy all three claims. Therefore, Mid-Hudson is to be paid in full, the government the rest on account, and Baum nothing.

8. There was an alternative theory propounded by the government, and accepted by the Court. This was that the sheriff's sale could in any event have had no effect on the government's liens, since proper notice of that sale was not given to the government. This resolves the case insofar as the priority between Baum and the

government is concerned, but leaves the position of Mid-Hudson open. The government therefore still remains in the case, because Mid-Hudson's claim for approximately \$7,000 survives, as well as Baum's claim for an alleged surplus in an amount less than \$7,000.

9. An error was made by counsel for the government in asserting the theory described in the preceding paragraph. One of the tax liens was filed on February 18, 1972, less than 30 days before the sheriff's sale date of March 7, 1972. (Opinion, pages 3 and 4, n.1). The statute requires notice to the Internal Revenue Service only if the lien was filed more than 30 days before the sale; Id.: 26 U.S.C. 7425(b)(1). Therefore, Baum would take free of this lien, and upon the subsequent Internal Revenue Service sale, would be entitled to the monies now allocated to satisfy this lien, all assuming the validity of the sheriff's sale. The government is accordingly constrained to support plaintiff's motion for reargument insofar as it provides the vehicle for the re-evaluation of this additional datum. However, we continue to rely upon our other theory, reasserted herein, in support of the Court's grant of the government's motion for summary judgment.

WHEREFORE, it is respectfully requested that leave to reargue be granted, and upon reargument, the original decision be adhered to: that the government's motion for summary judgment of dismissal be granted in its entirety.

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Sworn to before me
this 17 day of April, 1974

WILLIAM R. BRONNER
Assistant United States Attorney

MEMORANDUM DECISION (Filed April 2, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
APR 2 4 15 PM '74
S.D.N.Y.

90a

-----x
MORTON I. BAUM,

Plaintiff,

: 72 Civ. 3932

-against-

: MEMORANDUM
: DECISION

UNITED STATES OF AMERICA,

Defendant.

: ~~17~~ X 0544

-----x
GAGLIARDI, D. J.

Plaintiff Morton Baum sues to recover from the defendant surplus monies arising out of the sale of property seized by the Internal Revenue Service for the non-payment of federal taxes pursuant to 26 U.S.C. §§ 6335, 7425(b), and 7426(a)(2) on March 17, 1972. Jurisdiction is based on Section 7426(a)(2) of the Internal Revenue Code of 1954. Before the Court are motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure by both parties and a motion to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The following relevant facts were stipulated to by the parties:

"Representatives of I.R.S. posted a notice of seizure at the real property of J.W. Construction Corp., located on Route 6, R.D. #3, Town of Greenville, Orange County, New York,

91a

on September 9, 1971. This property was later sold by I.R.S. at an administrative sealed bid sale held on March 17, 1972 after publication of a notice of sealed bid sale dated February 17, 1972. The property was purchased by a person named Wilkin at a price of \$31,010.00. Defendant claimed federal tax liens, and will eventually account for actual amounts affecting the premises as follows:

PERIOD ENDING	DATE OF ASSESSMENT	PRINCIPAL, INTEREST AND PENALTIES
9/30/70	12/11/70	\$ 4,277.11
12/31/70	5/14/71	4,074.30
6/30/71	11/16/71	7,394.53
9/30/71	1/28/72	9,151.16
		<u>\$24,897.10</u>

"On July 26, 1971, a judgment was entered against J.W. Construction Corp. and Jack Waschitz in favor of Mid-Hudson Painting and Decorating Co. in the amount of \$7,585.38. This judgment was entered in the Supreme Court, State of New York for the County of Orange and docketed in the Orange County Clerk's Office.

"Thereafter, Mid-Hudson issued an execution dated August 30, 1971 on the judgment and delivered it to the Orange County Sheriff. The Orange County Sheriff posted his notice of levy on the real property of J.W. Construction Corp. on October 4, 1971. Pursuant to notice of sale dated January 4, 1972, the Sheriff advertised for sale at public auction, on March 7, 1972, the same premises to be sold by I.R.S. on March 17, 1972 for the unpaid federal tax liens.

ONLY COPY AVAILABLE

"Prior to the Sheriff's sale held on March 17, 1972, the Orange County Sheriff posted a Notice of Sale at three places in the Town of Greenville and three places in the Town of Coshen, all six being posted on January 18, 1972. In addition, a copy of the Notice of Sale was published in the Middletown Times-Herald Record, a newspaper having general circulation in Orange County and its surrounding vicinity, in issues of January 7, 21, February 4, and 18 of 1972. A copy of the Notice of Sale was served by certified mail, return receipt requested, on State Tax Commission, Mid-Hudson Painting and Decorating Co., Charles G. Smith Assoc., Inc., National Union Bank of Monticello, Public Service Mutual Insurance Company, Empire National Bank, Murphy Door Red Co., Inc., Industrial Commissioner of the State of New York, Mid-Hudson Automatic Sprinkler Co., Inc., and Hatfield Bros., Inc. A copy of the Notice of Sale, certified mail, return receipt requested, was not served upon I.R.S. or its delegate. However, plaintiff contends that actual notice of the proposed Sheriff's sale was received by authorized representatives of I.R.S. at least twenty-five days prior to the date of sale. Defendant admits actual notice but does not recall whether or not notice was acquired at least twenty-five days prior to the sale.

"Plaintiff bid in the property and interest of J.W. Construction Corp. at the Orange County Sheriff's Sale held on March 7, 1972, and later received a Sheriff's Deed dated May 18, 1972. Representatives of the I.R.S. attended the public

4 auction held by the Orange County Sheriff and announced that the property being sold at the Sheriff's sale was subject to federal tax liens and prior levy by I.R.S. and sealed bid sale to be held on March 17, 1972, 10 days later. The Sheriff then completed the auction [and plaintiff purchased the property for \$5.00].

"The records maintained by the Orange County Clerk indicate [twenty various claims against J.W. Construction Corp. aggregating \$166,296.80]."

The narrow question before the Court is whether the Sheriff's sale on March 7, 1972 extinguished the junior federal tax liens on the property.¹ Section 7425(b) and (c) of the Internal Revenue Code sets forth the statutory requirements:

"(b). . . a sale of property on which the United States has or claims a lien, . . .

(1) shall, except as otherwise provided, be made subject to and without disturbing such lien or title, if notice of such lien was filed or such title recorded in the place provided by law for such filing or recording more than 30 days before such sale and the United States is not given notice of such sale in the manner prescribed in subsection (c) (1); or. . .

(c) Special Rules.

(1) Notice of Sale - Notice of a sale to which subsection (b) applies shall be given

¹Three federal tax liens were filed in the Orange County Clerk's Office subsequent to the filing of the judgment of Mid-Hudson Painting & Decorating on July 26, 1971: \$3,930.05 on August 26, 1971; \$2,807.90 on December 31, 1971; and \$16,302.71 on February 18, 1972.

(in accordance with regulations prescribed by the Secretary or his delegate) in writing, by registered or certified mail or by personal service, not less than 21 days prior to such sale, to the Secretary or his delegate. (emphasis added)

The plain meaning of the statute requires the prescribed notice. The Senate Report prepared in connection with the passage of the Federal Tax Lien Act of 1966 made clear that "the bill provides a series of rules which are to be followed." 1966 U.S. Code Congressional and Administrative News 3749. "Since the lien of a tax assessment is entirely statutory, the procedure dictated by the statute must be strictly followed to ensure priority against subsequent judgment creditors. . ." United States v. Ruby Luggage Corp., 142 F. Supp. 701 (S.D.N.Y. 1954). See Dimes Savings Bank of Brooklyn v. Sherman, 64 Misc. 2d 457, 314 N.Y.S. 2d 86 (1970) (B. Meyer, J.). When the defendant received actual notice is not dispositive of this motion. While the statute permits the Government in its discretion to consent to a sale free of its claim, Section 7425(c)(2) of the Internal Revenue Code, the appearance of the representatives of the Internal Revenue Service at the Sheriff's sale and their announcement of the outstanding tax liens and of the sealed bid sale scheduled for ten days later constitute affirmative proof that the Internal Service neither waived the required notice nor consented to the sale.

Since the stipulated facts indicate that a copy of the Notice of Sale was not sent to the Internal Revenue Service, the Sheriff's sale could not have disturbed the Government's tax liens on the property of J.M. Construction Corp. Accordingly, the defendant's motion for summary judgment is granted.²

So Ordered.

U.S.D.C.

Dated: New York, New York
February 14, 1974.

²Since defendant's motion for summary judgment is granted, it is unnecessary to decide defendant's motion to dismiss the complaint, except insofar as to note that plaintiff has standing to bring this action.

MEMORANDUM DECISION (Filed May 29, 1974)
UNITED STATES DISTRICT COURT

96a

SOUTHERN DISTRICT OF NEW YORK

MORTON I. BAUM,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.

72 Civ. 3932

MEMORANDUM
DECISION

GAGLIARDI, D. J.

Plaintiff's motion for reargument pursuant to Rule 59 Fed. R. Civ. P. is granted. By Memorandum Decision filed April 2, 1974 this court held that the Internal Revenue Service ("IRS") on behalf of the defendant United States of America did not receive adequate notice pursuant to 26 U.S.C. §7425(b) and (c) of a sheriff's sale of the property of judgment debtor J.W. Construction Corp. and thus, the junior federal tax liens on the property were not extinguished by the sale. This court is requested by this motion to determine who is entitled to the surplus of the proceeds from the deferral tax sale of the property after application of the proceeds to the IRS and to reconsider the decision and order of April 2, 1974. Defendant IRS joins in the plaintiff's motion. For the reasons set forth

herein, summary judgment for the defendant dismissing plaintiff's complaint is granted. Familiarity with this court's earlier decision is assumed and the facts will not be repeated herein.

When a taxpayer fails to pay the taxes assessed and due, 26 U.S.C. §6331 authorizes the Secretary to "collect such tax. . . by levy upon all property or rights to property belonging to such person or on which there is a lien provided in this chapter for payment of such tax." In the present case the IRS filed four liens for unpaid federal taxes against J.W. Construction Corp. for various quarterly periods in 1970 and 1971 and on September 9, 1971 the IRS posted notice of seizure of J.W. Construction Corp.'s real property located in the Town of Greenville, Orange County, New York. Upon service of a notice of levy the IRS "effects a seizure that is tantamount to a transfer of ownership." United States v. Pittman, 449 F.2d 623, 626 (7th Cir. 1971). "The levy therefore gave the United States full legal right to the [property] levied upon as against the claim of the petitioner receiver." Phelps v. United States, 43 U.S.L.W. 4590, 4592 (May 20, 1975 . Following the service of the notice of levy, the taxpayer's interest is only nominal, and thus, the taxpayer has no interest upon which the sheriff can levy and sell.

Here, as in United States v. Pittman, the IRS

proceeded with the public notice and sale within the time limitations provided in 26 U.S.C. § 6335. Moreover, the concern with notification expressed in Pittman with respect to the transfer of ownership to the IRS on the basis of the notice and levy does not apply to the property in question. In attending the state execution sale and announcing its pending levy and upcoming sale, the IRS made it clear to potential purchasers that pursuant to its valid levy the IRS did not intend to relinquish constructive possession of the property.¹ That the IRS' sale occurred after the sheriff's purported levy and sale does not change the result; the operative date for the IRS' seizure of the property is the date of the service of the notice of levy. See United States v. Pittman, supra; First Nat. Bank of Norfolk, supra.

Plaintiff argues that the issue herein is one of lien priority only and that he is the purchaser of the judgment creditor's interest. It is clear that under New York law upon delivery of the judgment execution to the sheriff, intervenor Mid-Hudson, the judgment-creditor, had a lien on the judgment debtor's property, and were it not for the federal tax levy by the IRS, the sheriff's

¹Following the statement by the representative of the IRS, a bid of \$5,000 by the first mortgagee was withdrawn and the plaintiff Baum purchased the property for \$5.

levy upon the same property would have brought the property within custodia legis and subject to the sheriff's sale. In re Livingston's Estate, 211 N.Y.S.2d 897 (Surr. Ct. New York Cty. 1961); In re General Assignment for the Benefit of Creditors of Mehr, 20 Misc.2d 481, 186 N.Y.S.2d 976 (Sup. Ct. 1959). However, state procedures may not be utilized to prevent the collection of a federal tax by an IRS levy. Burnet v. Harmel, 287 U.S. 103 (1932). To hold the sheriff's sale valid would violate the Supremacy Clause of the Constitution. Fried v. N.Y. Life Insurance Co., 241 F.2d 504, 505-06 (2d Cir. 1957).

Accordingly, the sheriff's sale pursuant to the state execution of judgment was of no legal significance, and the plaintiff herein who purchased the property has no interest in the surplus proceeds available from the federal tax sale. The valid lien of the intervenor Mid-Hudson remains and that claim may be pursued pursuant to 26 U.S.C. §6342.

Defendant's motion for summary judgment dismissing plaintiff's complaint is granted.

So ordered.

U.S.D.C.

Dated: New York, New York
May 27, 1975.

NOTICE OF APPEAL (Filed June 6, 1975)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
MORTON I. BAUM,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.
-----X

File No. 72 Civ. 3932 LPG

NOTICE OF APPEAL
Docket No. T-3404

NOTICE is hereby given that Morton I. Baum, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of Hon. Lee P. Gagliardi, entered in this action on May 29, 1975, which said order granted the defendant's motion for summary judgment dismissing plaintiff's complaint and failed to grant summary judgment to the plaintiff.

Dated: Monticello, New York
June 3, 1975

BAUM & GERSTEN
Attorneys for Plaintiff
Of Ice & P. O. Address
15 Hamilton Avenue
Monticello, New York, 12701
(914) 794-5641

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MORTON I. BAUM,

Plaintiff-Appellant,

- against -

UNITED STATES OF AMERICA,

Defendant-Appellee.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK

SS.:

I, Eugene L. St. Louis

being duly sworn,

depose and say that deponent is not a party to the action, is over 18 years of age and resides at

1235 Plane Street, Union, N.J. 07083

That on the 15th day of September 1975, deponent served the annexed *Appendix*

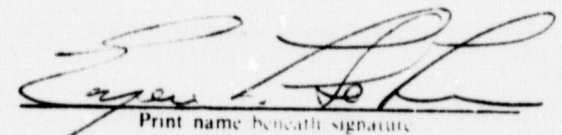
upon Lawrence X. Kennedy

attorney(s) for

in this action, at 1 Harriman Square, Goshan, N.Y. 10924

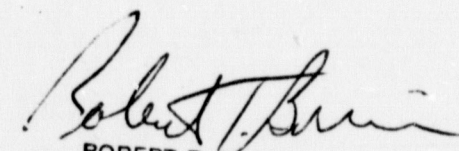
the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 15th
day of September 1975



Print name beneath signature

EUGENE L. ST. LOUIS



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MORTON I. BAUM,

Plaintiff-Appellant,

against

UNITED STATES OF AMERICA,

Defendant-Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

James A. Steele

ss.:

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N. Y.That on the 15th day of September 1975 at 1 St. Andrews Plaza, N. Y., N. Y.

deponent served the annexed Appendix

upon

Asst. U.S. Attorney for the Southern District of N. Y.

William R. Bronner for Paul Curran, U.S. Attorney

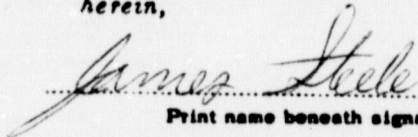
the Attorney

in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the

herein,

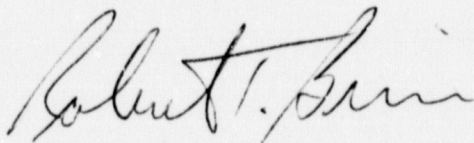
Sworn to before me, this 15th

day of September 1975



Print name beneath signature

JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977